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## Commercial Law

Daniel E. Murray

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# Commercial Law

DANIEL E. MURRAY\*

*The author surveys and discusses recent case law and legislation dealing with the manifold aspects of commercial law. Primary among the topics examined are decisions concerning sales of goods, products liability, warehousing and shipping, negotiable instruments, sureties and guarantors, mortgages, banking, and secured transactions, as well as legislation on both state and federal levels affecting these fields. Particular attention is given to the impact of the Bankruptcy Reform Act of 1978 on secured transactions.*

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\* Professor of Law, University of Miami School of Law.

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## I. INTRODUCTION

This article<sup>1</sup> attempts to survey all cases and legislation arising under the Uniform Commercial Code (UCC) and in areas outside of the UCC but within commercial law practice.

## II. SALE OF GOODS

### A. *Venue*

In actions against domestic corporations, three venue alternatives are possible: (1) the place of business of the corporation; (2) the place where the cause of action accrued; or (3) the place where the property involved in the litigation is located. Thus, under section 47.051 of the Florida Statutes, when a seller of mobile homes in Palm Beach County mailed a letter to a buyer of mobile homes in Putnam County telling the buyer that their continuing contract was being cancelled, the breach of contract occurred in Palm Beach County and proper venue was in Palm Beach County where the cause of action accrued, and not in Putnam County.<sup>2</sup>

### B. *Goods and the Statute of Frauds*

A contract between a university publisher and an author whereby the publisher agreed to print books for sale to the public was held not to be a contract for the sale of goods, but rather a contract for services. Even though the contract did not specify the

1. This article surveys the cases reported in volumes 350 through 362 So. 2d and Florida legislation enacted in 1978.

2. *Perry Bldg. Sys., Inc. v. Hayes & Bates, Inc.*, 361 So. 2d 443 (Fla. 2d DCA 1978) (construing FLA. STAT. § 47.051 (1977)).

number of books to be printed, the Statute of Frauds provision of the UCC (section 2-201(1)), establishing that a written contract is not enforceable "beyond the quantity of goods shown in such writing," was held inapplicable to the contract because it was not a sale of goods.<sup>3</sup>

Similarly, if a developer makes a direct and original promise with a subcontractor to pay him for goods and services, this promise is not covered by the Statute of Frauds, but if the developer promises to pay the subcontractor in the event that the general contractor does not, this promise would be within the Statute of Frauds as a promise to pay the debt of another.<sup>4</sup>

A dishonored check which stated that it was for a specified invoice and which was deposited by the payee seller of goods was, for at least that part of the contract, held to be within the Statute of Frauds language of the UCC, "[w]ith respect to goods for which payment has been made and accepted or which have been received and accepted."<sup>5</sup> As a result, the check removed the case from the confines of the Statute of Frauds and the buyer was deemed liable.<sup>6</sup> Moreover, written acknowledgments sent by the merchant seller as to which the merchant buyer failed to offer evidence of objection also operated to remove the case from the statute.<sup>7</sup>

### C. Remedies

In a suit by a seller against the buyer for breach of a sale of goods contract, it is reversible error for the trial court to fail to charge the jury that the seller is entitled to loss of profits under section 2-708(2) of the UCC.<sup>8</sup>

In an action for goods sold and delivered, it is incumbent upon the plaintiff seller to prove that the goods have, in fact, been sold and delivered for an agreed price. In order to prove delivery, the ledger sheets and delivery tickets of the plaintiff seller should be admitted into evidence under section 90.803(6)(a) of the Florida Statutes (Supp. 1976), even though there might be a question as to the validity of the delivery tickets because the seller may be unable to prove that the signers of the delivery tickets were persons authorized to receive the goods.<sup>9</sup>

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3. *Mallin v. University of Miami*, 354 So. 2d 1227 (Fla. 3d DCA 1978) (per curiam).

4. *Clover Interior Sys., Inc. v. General Dev. Corp.*, 357 So. 2d 459 (Fla. 2d DCA 1978) (interpreting FLA. STAT. § 725.01 (1977)).

5. FLA. STAT. § 672.201(3)(c) (1977).

6. *Lea Indus., Inc. v. Raelyn Int'l, Inc.*, 363 So. 2d 49 (Fla. 3d DCA 1978) (per curiam).

7. *Id.* at 52 (applying FLA. STAT. § 672.201(2) (1977)).

8. *Vagabond Container, Inc. v. City of Miami Beach*, 356 So. 2d 1266 (Fla. 3d DCA 1978) (per curiam) (construing FLA. STAT. § 672.208(2) (1975)).

9. *Bosem v. A.R.A. Corp.*, 350 So. 2d 526 (Fla. 3d DCA 1977) (per curiam).

Rule 43 of the Grain and Feed Dealers' National Association provides that a seller's failure to ship grain in conformity with the contract terms "shall be grounds for the refusal only of such shipment or shipments, and not for the rescission of the entire contract." A Florida district court of appeal has held that this exclusive remedy under a contract for the sale of corn to a chicken farmer might fail of its essential purpose under the UCC,<sup>10</sup> with the result that other UCC remedies would come into play. The case was therefore remanded for a factual determination of the issue.

#### D. *Products Liability*

##### 1. JURISDICTION

According to section 48.193(1)(b) of the Florida Statutes (1975), any person who "commits a tortious act within this state" is subject to personal jurisdiction. A Florida district court of appeal, however, refused to subject to long-arm jurisdiction an out-of-state automobile dealership which had, in North Carolina, serviced a car. The automobile had first been owned by a rental company; subsequently it was sold at auction in Florida and ultimately to Florida buyers by a Florida car dealer. The court reasoned that exercising personal jurisdiction under those circumstances would be too broad an interpretation of the statute and would not satisfy the minimum contacts requisites of due process.<sup>11</sup> Moreover, section 48.193(1)(f)(2), which subjects to personal jurisdiction nonresidents who cause injury to persons or property in this state by the use of products serviced or manufactured by the nonresident which are used or consumed in Florida, could not be constitutionally applied to the foreign car dealer because, under prior decisions, it would violate traditional notions of fair play and substantial justice.<sup>12</sup>

On the other hand, a complaint which alleged that the plaintiff had purchased a paint spray gun as a result of an advertising campaign conducted by the foreign manufacturer in this state and that the spray gun was distributed by the company for use by citizens of this state is sufficient to give a Florida court jurisdiction under section 48.193(1)(f) and (2) of the Florida Statutes (1975) and to satisfy the minimum contacts required by the due process clause.<sup>13</sup>

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10. *Tampa Farm Serv., Inc. v. Cargill, Inc.*, 356 So. 2d 347 (Fla. 2d DCA 1978) (construing FLA. STAT. §§ 672.719(1)(a), (2) (1975)).

11. *Jack Pickard Dodge, Inc. v. Yarbrough*, 352 So. 2d 130 (Fla. 1st DCA 1977).

12. See *Hanson v. Denckla*, 357 U.S. 235 (1958); *Dunn v. Upjohn Co.*, 350 So. 2d 127 (Fla. 1st DCA 1977).

13. *Electro Eng'r Prods. Co. v. Lewis*, 352 So. 2d 862 (Fla. 1977). In *Chinetti Garthwaite Imports, Inc. v. Sadkin*, 358 So. 2d 90 (Fla. 3d DCA 1978), the court upheld jurisdiction, under §§ 48.193 and 48.194, over a Delaware corporation, a franchisor of automobile dealers,

A foreign manufacturer which did not have any offices in Florida and which sold baseball helmets to retailers and baseball teams in this state in accordance with telephone orders and purchase orders was not subject to process under section 48.181 of the Florida Statutes (1975) because it did not retain any control over its customers in this state; its Florida customers were not brokers, jobbers, wholesalers or distributors. Also, the manufacturer had no control over the helmets in this state.<sup>14</sup> It should be noted, however, that section 48.182 was not enacted until after the occurrence of the injury in this case and was therefore not applicable.<sup>15</sup>

The mere fact that a foreign manufacturer's products are component parts of forklift vehicles used throughout Florida was not sufficient to subject the manufacturer to the jurisdiction of the Florida courts under section 48.193(1)(f)(2) of the Florida Statutes (1977) when the manufacturer had no other contacts with Florida. Although the statute does attempt to confer jurisdiction, it would have been unconstitutional to do so here because there were insufficient contacts with Florida and maintenance of the suit would have offended traditional notions of fair play.<sup>16</sup> Inasmuch as the case involved a suit by an individual Florida plaintiff against a corporation in Florida which filed a third party claim against the foreign manufacturer, one must wonder why the corporation in Florida did not use the vouching-in process permitted by section 672.607 of the Florida Statutes (1977), rather than the ineffective long-arm statute.<sup>17</sup>

## 2. VENUE

In a products liability case, when the product, a tire, which had been sold and mounted on a police car in Sebring, Florida and had subsequently exploded near that city, killing a police officer, and

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in a breach of warranty suit brought by a retail customer. The decision was based on a review of the franchise agreement and the deposition of the franchisee auto dealer, setting forth the actions of the franchisor and franchisee before and after the execution of the agreement. In contrast, the same court in *HYCO Mfg. Co. v. Rotex Int'l Corp.*, 355 So. 2d 471 (Fla. 3d DCA 1978), held that a complaint did not sufficiently show the basis for long-arm jurisdiction over the nonresident defendants. The plaintiff buyer of a truck in Florida was damaged as the result of an accident in Ecuador and sued, in a Florida court, the Florida seller and various out-of-state component parts manufacturers. *See also* *World Business Consultants, Ltd. v. Automotive Finishes, Inc.* 352 So. 2d 120 (Fla. 2d DCA 1977) (upholding long-arm jurisdiction under FLA. STAT. §§ 48.181, .193(1)(a) (1975)).

14. *American Baseball Cap, Inc. v. Duzinski*, 359 So. 2d 483 (Fla. 1st DCA 1978).

15. FLA. STAT. § 48.182 (1970) (repealed 1973). Long-arm jurisdiction over foreign manufacturers of products used and causing injury in Florida is presently provided for in FLA. STAT. § 48.193 (1977).

16. *Harlo Prods. Corp. v. J.I. Case Co.*, 360 So. 2d 1328 (Fla. 1st DCA 1978).

17. *See* W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* 261 (1964).

the plaintiffs and all material witnesses were residents of Sebring, it was held to be an abuse of discretion for the trial court judge in Miami to refuse to transfer venue to Sebring. Under section 47.122 of the Florida Statutes (1975), such a transfer should have been allowed in the interest of justice and for the convenience of the parties.<sup>18</sup>

### 3. WARRANTY AND TORT LIABILITY

According to one district court of appeal, in order properly to allege a cause of action for breach of warranties under the UCC, the complaint must include: (1) the facts of the sale of goods; (2) the kind of warranty, whether an express warranty under section 2-313 of the UCC, an implied warranty of merchantability under section 2-314, or an implied warranty of fitness for a particular purpose under section 2-315; (3) the facts which created the particular warranty or warranties; (4) the facts showing a breach of warranty; (5) notice to the seller under section 2-607(3)(a); and (6) the damages incurred by the buyer as a result of the breach of warranty or warranties.<sup>19</sup>

In a products liability suit, it is not sufficient in the complaint to allege that the goods are defective without alleging facts showing in what manner they are defective or how they could have been made safe; detailed facts must be alleged, not just conclusions.<sup>20</sup> In addition, a suit brought against an importer and distributor of foreign cars for its alleged failure to warn of a design defect is fatally defective unless it is alleged and proven that the importer had knowledge of this defect.<sup>21</sup>

When a long period elapses between the manufacture of a product and a subsequent injury caused by that product, it is necessary to prove that the product was defective when it left the manufacturer. Proffered evidence that the manufacturer has made design improvements to a product as a result of new materials and improved technology does not, by itself, show negligence in the manu-

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18. *Kelly-Springfield Tire Co. v. Moore*, 355 So. 2d 451 (Fla. 3d DCA 1978).

19. *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. 4th DCA 1977).

20. *Rice v. Walker*, 359 So. 2d 891 (Fla. 3d DCA 1978).

21. *Skinner v. Volkswagen of America, Inc.*, 350 So. 2d 1122 (Fla. 3d DCA 1977).

In *Ford Motor Co. v. Havlick*, 351 So. 2d 1050 (Fla. 4th DCA 1977), the court upheld a charge to the jury dealing with the duty of Ford to warn of the danger from the defective design in the placement of the gas tanks of Pintos. The court affirmed a \$1.74 million verdict resulting from a rear end collision with a Pinto which had caused severe burns to the driver as the alleged result of the improper placement of the gas tank.

In another case concerning the duty to warn, the court held that there were material questions of fact as to whether there was a proper warning label on a container of detergent regarding the dangerous propensities of the product and regarding the proper dilution of the contents before use. *Mathis v. National Lab.*, 355 So. 2d 117 (Fla. 3d DCA 1978).

facture of the original product. As a result, this evidence is not relevant to prove the fact that the original product was defective.<sup>22</sup>

In a products liability case where the plaintiff sued the manufacturer of a child's swing set, as well as the seller of the set and the nursery which had purchased the set, and the plaintiff settled with the nursery and the retail seller of the swing set, the amount of this settlement must be deducted from a jury award against the ultimate manufacturer.<sup>23</sup>

In a case of apparent first impression in Florida,<sup>24</sup> it has been held that when a seller of a used aircraft showed the buyer the engine and propeller logbook, which stated that the engine had been completely overhauled and that new parts had been installed, and the buyer testified that he had relied upon the logbook and would not have bought the aircraft except for the statements contained therein, that the seller expressly warranted the accuracy of the statements contained in the logbook under section 2-313 of the UCC. Furthermore, it was no defense that the seller was not aware that the statements in the logbook were false. Also, when the engine failed and the buyer had to pay for the ground transportation of the aircraft to overhaul facilities and for the overhaul, he was entitled to recover these sums, under sections 2-714(3) and 2-715(2) of the UCC, from the seller, the mechanic who did the initial overhaul, and the defendant FAA inspector who certified the repairs as having been done. The latter two parties did not appeal the question of liability, only the amount of damages, and this case cannot be construed as precedent for holding individuals in these categories liable to a purchaser. The dissenting judge pointed out that, inasmuch as a seller of an aircraft must transfer the logbook to the purchaser, the effect of this case is to make every seller an express warrantor of the contents of the logbook, and, accordingly, a warrantor that overhaul and maintenance work was done in a workmanlike manner. He considered this an unreasonable result.

In an overly succinct opinion, it was held that brochures issued by a manufacturer of fiberglass and asbestos material used on house exteriors, which were distributed by a distributor and installer of the materials and which had been relied upon by an ultimate consumer, could be sufficient to substantiate a case involving breach of warranties, fraud and negligence charges against these parties.<sup>25</sup>

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22. *Ellis v. Golconda Corp.*, 352 So. 2d 1221 (Fla. 1st DCA 1977). Similarly, another court affirmed the dismissal of a complaint based upon the negligent design of a 20-year-old tractor, which required the removal of its gas tank when certain repairs were being done. *Hunt v. Nowicki*, 351 So. 2d 1030 (Fla. 4th DCA 1976).

23. *Leisure Group, Inc. v. Williams*, 351 So. 2d 374 (Fla. 2d DCA 1977).

24. *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. 3d DCA 1977).

25. *Garesche v. Textured Coatings of America, Inc.*, 352 So. 2d 1207 (Fla. 4th DCA 1978).



A district court of appeal has held that in the sale of a used homemade "Custom Trike Honda Three Wheeler" motorcycle by a dealer, there may be implied warranties of merchantability and fitness under sections 2-314 and 2-315 of the UCC and express warranties of dependability and safety under section 2-313, in spite of the fact that the sales contract, signed by the purchaser, provided for an "as is" sale. The court was of the view that the phrase "unless the circumstances indicate otherwise," as found in section 2-316 of the UCC, indicates that these "magic words" do not of themselves rule out these warranties. The test is what was the understanding of the parties, which test can be developed only through a full trial and not upon summary judgment. The court also noted that even if the "as is" disclaimer were effective as to warranties, it would not necessarily preclude liability for negligence of the seller.<sup>26</sup> The holding of this case that there can be implied warranties in the sale of a used, homemade product seems to be extreme, and the view that the "as is" sale is dependent upon the parties' understanding of the terms appears, in a practical sense, to deprive the phrase of any real meaning.

The Supreme Court of Florida, reversing two district courts of appeal,<sup>27</sup> held that the doctrine of *res ipsa loquitur* cannot be applied in tire blowout cases because it cannot be conclusively shown on the basis of human experience that tire blowouts do not ordinarily occur in the absence of negligence by the manufacturer, and that this is particularly true when the tire has burst after it has been in the possession of a party who has subjected it to significant use.<sup>28</sup> Furthermore, it would not be appropriate to use this doctrine when the facts of the accident were discoverable and provable and when

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26. *Knipp v. Weinbaum*, 351 So. 2d 1081, 1083 (Fla. 3d DCA 1977).

27. *Dayton Tire & Rubber Co. v. Davis*, 348 So. 2d 575 (Fla. 1st DCA 1977); *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 336 So. 2d 1221 (Fla. 4th DCA 1976).

28. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339 (Fla. 1978).

Although the doctrine of *res ipsa loquitur* would be appropriate in some situations, unless the injured plaintiff can establish that the instrumentality causing the injury was under the exclusive control of the defendant, and that the accident would not have occurred in the ordinary course of events without negligence on the part of one in control, an inference of negligence should not be made. *See* W. PROSSER, *THE LAW OF TORTS* 214 (1971). *See also* *Jones v. Auburn Mach. Works Co.*, 353 So. 2d 917 (Fla. 2d DCA 1978), *aff'd*, 366 So. 2d 1167 (Fla. 1979). In *Jones*, the court reversed a summary judgment because there were material questions of fact as to whether a ditch digger was a source of latent or patent danger to a 16-year-old boy who was employed to lay cable behind the machine. The plaintiffs sued the manufacturer for breach of warranty and under the theory of strict liability. *RESTATEMENT (SECOND) OF TORTS* § 402A (1965); *see* notes 30-31 and accompanying text *infra*. *See also* *Schurr v. Royal Globe Ins. Co.*, 353 So. 2d 215 (Fla. 2d DCA 1977), dealing with the impropriety of directing a verdict for the defendant before the plaintiff had completed his case in a products liability action dealing with an allegedly defective riding lawn mower.

the tires were not in the exclusive control of the manufacturer.<sup>29</sup>

The doctrines of breach of implied warranty and strict liability in tort "have become so intertwined"<sup>30</sup> that a district court of appeal has held that a charge to the jury on implied warranty substantially instructed the jury as to strict liability, and thus the refusal of the trial court to charge the jury as to strict liability in tort had no practical significance.<sup>31</sup>

The Supreme Court of Florida upheld the constitutionality of sections 95.11(3)(c) and 95.022 of the Florida Statutes (1975),<sup>32</sup> which resulted in a products liability claimant having seven months less time to sue than under the former statutes in effect at the time of his injury. The court noted that a claimant does not have a vested interest in a limitations statute, and if the amended statute has a savings clause which permits suit within a set time, the statute is constitutional.<sup>33</sup>

#### 4. LEASES OF GOODS

Although a lease of well pumps contained a disclaimer of implied warranties of fitness for a particular purpose which would negate any implied warranty created under case law, it was possible to show that oral statements made by the lessor during the operation of the pumps constituted oral express warranties which resulted in a valid oral modification of the written contract.<sup>34</sup>

#### 5. INDEMNIFICATION

In a case of first impression in Florida, the District Court of Appeal, Fourth District, decided that a retailer, who had had no

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29. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1342 (Fla. 1978).

30. *Sansing v. Firestone Tire & Rubber Co.*, 354 So. 2d 895, 897 (Fla. 4th DCA 1976). The Supreme Court of Florida adopted strict liability in tort in 1976. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); see Murray, *Commercial Law, 1976 Developments in Florida Law*, 31 U. MIAMI L. REV. 895, 898-99 (1976). In a procedurally interesting case, the supreme court decided that where a trial court dismissed, as a matter of law, a count in strict liability prior to *West*, the issue should be considered on remand because it had been properly brought. *West* was determined during the course of the appeal to the district court.

31. *Sansing v. Firestone Tire & Rubber Co.*, 354 So. 2d 895 (Fla. 4th DCA 1978).

32. In 1974, chapter 95 of the Florida Statutes was substantially revised and the changes became effective January 1, 1975. Under the former statute, there was a four-year statute of limitations for negligence/products liability cases. Under the revised statute, 95.10(3)(c), a right of action based on the design, planning or construction of an improvement to real property is cut off 12 years from the date of possession by the owner or from the date of termination or completion of the contract. Under § 95.022, the saving clause, any action which would be barred by the revision, but would not have been barred under prior law, could be commenced before January 1, 1976, a one-year savings period.

33. *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401 (Fla. 1978).

34. *Barile Excavating & Pipeline Co. v. Vacuum Under-Drain, Inc.*, 362 So. 2d 117 (Fla.

knowledge of the defective nature of a product and who was therefore exonerated in a suit by the injured consumer, was entitled to indemnification for attorney's fees and the costs of the defense from the manufacturer of the product. The manufacturer may be held liable for the defective manufacture under either a negligence, breach of implied warranty or strict liability theory.<sup>35</sup>

If a manufacturer-lessor is negligent in manufacture of scaffolding, then it is not entitled to common law indemnity from its lessee for harm caused to third parties. If, however, the harm to third parties was caused by the negligence of both the manufacturer-lessor and its lessee, then the lessee may be liable for indemnification to the lessor under a lease provision stating that the lessee assumed all responsibility for claims arising out of the erection, maintenance, use or possession of the equipment and that it agreed to hold the lessor harmless from all such claims. This indemnification agreement cannot be construed to bind the lessee to indemnify the lessor against claims caused solely by the lessor's negligence, unless there is a specific provision containing such language.<sup>36</sup>

Even in the absence of an indemnification agreement, a manufacturer who is sued for an alleged breach of an implied warranty and who may be passively negligent may bring a third party complaint for indemnification against the employer of the plaintiff employee when it is alleged that the employer was actively negligent in the use of the product.<sup>37</sup>

The District Court of Appeal, Fourth District, held that an active tortfeasor who negligently caused injury to the plaintiff may not bring a third party complaint against the manufacturer of a

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1st DCA 1978); see *W.E. Johnson Equip. Co. v. United Airlines, Inc.*, 238 So. 2d 98 (Fla. 1970).

35. *Pender v. Skillcraft Indus., Inc.*, 358 So. 2d 45 (Fla. 4th DCA 1978). See also *Montgomery Indus. Int'l, Inc. v. Southern Baptist Hosp., Inc.*, 362 So. 2d 145 (Fla. 1st DCA 1978), which held that when a subcontractor who is supplying a waste disposal system advises the architect that his plans for the system are defective and then the subcontractor unilaterally changes the component parts when the architect does not change the plans, the subcontractor does not have a cause of action against the architect when the waste system catches fire and causes damage. If the subcontractor had simply followed the architect's allegedly defective plans, it would have had a cause of action against the architect for negligence and could have recovered in its third party complaint.

In another indemnification case, the District Court of Appeal, Third District, held that a hotel was entitled to indemnification by an elevator servicing contractor for injuries suffered by a hotel guest who was trapped in an elevator. In the absence of any clear provision in the servicing agreement exonerating itself, the maintenance company was not shielded from common law liability for indemnification. *Hart Prop., Inc. v. Eastern Elevator Serv. Corp.*, 357 So. 2d 257 (Fla. 3d DCA 1978).

36. *Spring Lock Scaffolding Rental Equip., Co. v. Charles Poe Masonry, Inc.*, 358 So. 2d 84 (Fla. 3d DCA 1978).

37. *Home Indem. Co. v. Edwards*, 360 So. 2d 1112 (Fla. 1st DCA 1978).

drug used in the treatment of that injury. The drug allegedly aggravated the injury to the victim of the tortfeasor because of negligent manufacture.<sup>38</sup> The Fourth District followed the view established by the Supreme Court of Florida that allowing indemnification of an active tortfeasor for aggravation of injuries through negligent medical treatment would improperly expand traditional concepts of indemnity.<sup>39</sup>

## 6. DAMAGES

In a suit between a homeowner and a manufacturer of roof tile which was installed by a subcontractor, a court may award damages for defective tile measured by the replacement costs rather than the diminution of the value of the house because of the defective roof when the cost of replacement is not grossly disproportionate to the value of the entire house.<sup>40</sup>

A jury award of \$3,500 for breach of an implied warranty resulting from the consumption of maggot-infested saltine crackers was not so excessive that the trial court should have ordered it reduced.<sup>41</sup> Unless the damages awarded by the jury are "so excessive as to shock the judicial conscience or to lead to the conclusion the jury predicated its verdict on passion or prejudice," a trial court may not order a remittitur.<sup>42</sup>

In a suit by condominium purchasers for damages for breach of warranties of fitness and merchantability on the ground that a noisy air conditioner rendered their unit uninhabitable, the test of the breach is to be objective rather than subjective. Thus, the proper question is "whether the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality."<sup>43</sup> That these owners personally viewed the unit as uninhabitable was not sufficient. In addition, when the defect complained of would be a continuing one and the facts showed that the value of their unit had increased after their purchase, they could not recover any damages, because the appropriate standard was the diminution in value caused by the defect.

In another case concerning breach by a condominium development corporation of an implied warranty of fitness, the court found the measure of damages to be the cost of correcting the defects. The alleged deficiencies were, *inter alia*, failure to provide soundboard,

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38. Ewell Eng'r & Contracting Co. v. Cato, 361 So. 2d 728 (Fla. 4th DCA 1978).

39. Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977).

40. Gory Associated Indus., Inc. v. Jupiter Roofing & Sheet Metal, Inc., 358 So. 2d 93 (Fla. 4th DCA 1978).

41. Sanders v. Nabisco, Inc., 359 So. 2d 46 (Fla. 1st DCA 1978).

42. *Id.* at 48.

43. Putnam v. Roudebush, 352 So. 908, 910 (Fla. 2d DCA 1977) (footnote omitted).

moisture proofing and housing for hot water heaters and the installation of an incorrect voltage system. These inferior features did not comply with the specifications incorporated into the purchase contract and, as a result, changed the building plans filed with the local government.<sup>44</sup>

### E. Legislation

Retail establishments which have a "no refund" policy must, since October 1, 1978, post a sign at the point of sale stating this fact. If the establishment fails to do so, it must grant a refund to a customer who tenders the goods within seven days of the sale in an unused condition and in the original carton, if one was furnished by the seller. This law does not apply to food, to custom-made or custom-altered goods, or to perishable goods.<sup>45</sup>

Every products liability insurance carrier in Florida must now submit annual reports to the Department of Insurance giving detailed information regarding products liability premiums written, premiums earned, claims filed, claims paid, and on other relevant matters. The Department of Insurance is required to provide a summary of the furnished information in its annual report.<sup>46</sup>

Another legislative change relating to products liability concerns the joinder of insurers as parties defendant and the statute of limitations applicable to actions for products liability and fraud.<sup>47</sup> The amendment provides that products liability insurers may no longer be joined as parties defendant with the insured; however, the insurers must file with the court information as to the name of the insurer, the name of each insured, the limits of coverage, and a statement of any policy or coverage defense. If the insurer indicates in this statement that any coverage defense has been or will be asserted, then the plaintiff may join the insurer as a party defendant. In any event, after the rendition of either a verdict or a final judgment in a nonjury trial, the insurer may be joined as a defendant.<sup>48</sup> The amendment also makes clear that actions for products

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44. *B & J Holding Corp. v. Weiss*, 353 So. 2d 141 (Fla. 3d DCA 1977). The court upheld the jury verdict against the builder under common law breach of warranty. The action was not barred by the one-year statute of limitation under FLA. STAT. § 711.24(1)(g)(3) (1977), since it was not bought under chapter 711.

45. FLA. STAT. § 501.142 (Supp. 1978).

46. *Id.* § 624.433.

47. 1978 Fla. Laws ch. 78-418, §§ 1, 2 (codified at FLA. STAT. §§ 46.051, 95.031(2) (Supp. 1978)). Unfortunately, the official heading of the amendment is seriously misleading because it refers to areas not dealt with by the act. For instance, while the heading provides that the liability of manufacturers and sellers shall be based on the knowledge and technology in existence when the product was originally sold, the amendment does not include such a provision.

48. *Id.* § 2 (codified at FLA. STAT. § 46.051 (Supp. 1978)).

liability and fraud must be brought within twelve years after the initial delivery of the product or the commission of the alleged fraud, regardless of when the defect or the fraud was or should have been discovered.<sup>49</sup>

### F. Bulk Sales

The District Court of Appeal, Second District, held that a shareholder of a corporation does not have standing to assert a bulk sales violation in the sale of the assets of a corporation. The shareholder had objected to the proposed sale, and, as a dissenting stockholder, he had the right to be paid the fair market value of his stock. The shareholder claimed status as a bulk transfer creditor, demanding payment directly out of the purchase price of the assets. The Second District held that the stockholder was not a creditor within the meaning of section 1-201(12) of the UCC. In addition, he could not qualify as a creditor under section 6-109, because that provision protects only creditors having claims arising out of events occurring before the sale, and the shareholder's right of redemption is not effective until the consummation of the sale.<sup>50</sup>

## III. WAREHOUSING AND SHIPPING PROBLEMS

The Supreme Court of the United States has upheld the constitutionality of section 7-210 of the UCC, which allows a warehouseman to sell bailed goods to cover unpaid storage charges.<sup>51</sup> The Court held that the authorization of the statute to the warehouseman of the right to sell was not state action and, therefore, that the bailee was not bound by the due process and equal protection requirements of the fourteenth amendment. The Court declined to find state action despite the bailor's argument that the statute authorized private individuals to perform a function—the power to execute a lien—traditionally exercised by a sheriff and that this delegation to the warehouseman constituted state action. Since the enforcement of a lien is not a function which is “traditionally exclusively reserved to the State,”<sup>52</sup> the Court found this delegation argument unpersuasive. The self-help allowed by section 7-210 to warehousemen was, as a result, not subject to constitutional safeguards because it lacked state action, absent an allegation of participation by public officials.

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49. *Id.* § 1 (codified at FLA. STAT. § 95.031(2) (Supp. 1978)).

50. *Brown v. Superior Pontiac—GMC, Inc.*, 352 So. 2d 576 (Fla. 2d DCA 1977).

51. *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

52. *Id.* at 157 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

If a stevedore no longer has custody of a shipper's goods which have been placed in a bonded warehouse awaiting further shipment to a buyer, and the facts show that the outgoing carrier has responsibility to collect demurrage after the free time period<sup>53</sup> has expired, then this outgoing carrier is deemed to be the bailee and solely responsible for any damage to the goods.<sup>54</sup>

When a Florida company shipped cloth to a Mexican firm which manufactured garments in accordance with the specifications provided by the Florida company and some of the garments were destroyed by fire while in the possession of the Mexican garment manufacturer, then the latter would be deemed to be a bailee and the loss would fall on the Florida bailor when the bailee showed that it had exercised ordinary care in its custody of the garments. In applying this common law rule, the court rejected the assertion that the Mexican garment manufacturer was either a warehouseman under section 7-204 or a merchant seller under section 2-509 of the UCC.<sup>55</sup>

In *Antillean Marine Shipping Corp. v. La Universal De Seguros, C. Por A.*,<sup>56</sup> goods were delivered to a sea carrier, loaded on board, then returned to Miami, the port of origin, and unloaded into the carrier's warehouse because the ship had run aground. The goods disappeared from the carrier's warehouse, and the shipper's subrogating insurance company sued the carrier, claiming that the carrier was liable for the full loss as a warehouseman. The carrier asserted the \$500 per package or customary freight unit defense under the Carriage of Goods by Sea Act (COGSA),<sup>57</sup> which was referred to on the back of the bill of lading, and stated that "[t]he provisions stated in said Act (except as may be otherwise specifically provided for herein) shall govern after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier."<sup>58</sup> Typed on the front side was a boldface legend providing that the "[c]arrier's and/or vessel's responsibility and/or liability ceases at end of ship's tackle at port of discharge."<sup>59</sup> The court held that the typewritten wording, which conflicted with the printed legend on the back of the bill of lading, was controlling.

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53. The free time period is that during which a vessel may remain unloaded or goods may remain at the pier before demurrage charges begin to accrue. See generally *American President Lines, Ltd. v. Federal Maritime Bd.*, 317 F.2d 887, 888-89 (D.C. Cir. 1962).

54. *Sentinel Enterprises v. Harrington & Co.*, 353 So. 2d 1238 (Fla. 3d DCA), cert. denied, 359 So. 2d 1219 (Fla. 1978).

55. *Breezy Bay, Inc. v. Industria Maquiladora Mexicana, S.A.*, 361 So. 2d 440 (Fla. 3d DCA 1978) (per curiam).

56. 359 So. 2d 516 (Fla. 3d DCA 1978).

57. 46 U.S.C. § 1304 (5) (1970).

58. 359 So. 2d at 517.

59. *Id.*

As a result, the effectiveness of the bill of lading terminated upon return of the goods to the carrier's warehouse in Miami. Thus, the court found that the protective provisions of COGSA were inapplicable, and it deemed the carrier a warehouseman and fully liable as a bailee. Because the ship never reached the destination, the port of discharge, however, the more logical conclusion would have been to find that the second typewritten legend was irrelevant and that COGSA limitations were governing.

In *Allied Van Lines v. Bratton*,<sup>60</sup> the Supreme Court of Florida reconciled a split among the district courts of appeal concerning the effectiveness of a limitation of liability clause in a bill of lading issued by a common carrier in accordance with ICC tariff regulations. The court held that the shipper of goods is bound by the limitation stated in the bill of lading, on the amount of recovery in the event of loss even though the shipper had not read the limitation clause and did not know of its existence. If the carrier, however, had induced the shipper not to read the contract or had misrepresented to the shipper that additional coverage could not be obtained for any potential loss, then the carrier would not have been allowed to plead the limitation clause.

#### IV. NEGOTIABLE INSTRUMENTS

##### A. Agency

The agency signing provision in section 3-403 of the UCC has reared its ungainly head in an unusual way. The District Court of Appeal, Second District, decided in *Havatampa Corp. v. Walton Drug Co.*<sup>61</sup> that a complaint states a cause of action against an agent as an individual, and that parol evidence could be introduced to show the capacity in which the agent signed a promissory note, where the principal's name appeared on the face of the instrument and the agent signed his name and office but the note did not clearly indicate an understanding by the parties that the agent would not be individually liable.<sup>62</sup> The promissory note stated that "we prom-

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60. 351 So. 2d 344 (Fla. 1977). The district court of appeal decision, which required knowledge of the clause by the shipper in order for the limitation of liability to be enforceable, was criticized by the author in a prior article. Murray, *supra* note 30, at 910.

61. 354 So. 2d 1235 (Fla. 2d DCA 1978).

62. See also Schwab v. Quitoni, 362 So. 2d 297 (Fla. 3d DCA 1978) (per curiam). A secretary of a corporation had signed a promissory note without indicating his secretarial status after his name. The court allowed parol testimony between the parties to show that the secretary had signed not merely as a corporate officer but as a personal guarantor.

In *Vacation, Inc. v. Southeast First Leasing, Inc.*, however, the appellate court affirmed the holding of the trial court that the mere fact that the guarantor adds the word "Pres." after his signature on a written guaranty separate from that of the corporation of which he



ise to pay,"<sup>63</sup> with the word "we" typewritten into the printed sentence. The printed signature lines, including the word "seal," were typed into the note as follows:

Walton Drug Co., Inc. d/b/a Touchton Drugs  
and/or \_\_\_\_\_ (Seal) X  
Bob Edrington, Owner  
\_\_\_\_\_ (Seal) X<sup>64</sup>

The "X" marks were handwritten, and the agent signed the note as "Bob Edrington, President" on the second line above. The payee asserted that Edrington had been informed at the time he signed the note that he was to be personally liable on it. The Second District stressed the importance of definiteness and certainty in commercial paper<sup>65</sup> transactions; by allowing an agent to be personally bound when he does not clearly indicate by the method of his signing his representative capacity, the court attempted to eliminate "technical objections by prospective takers of the paper, thereby enhancing negotiability."<sup>66</sup> Since ambiguity existed on the face of the note as to the capacity in which Edrington signed, the court allowed parol testimony under section 3-403 of the UCC to establish the understanding of the parties at the time the note was executed.

### B. *Accord and Satisfaction*

In a case of first impression in Florida, the District Court of Appeal, Second District, held that (1) when a drawer issued his check with the legend, "'LANDSCAPING PAID IN FULL'"<sup>66</sup> on the bottom left corner of the face of a check and the legend "'cashing of this check constitutes release and waiver of any lien'"<sup>67</sup> on the back of the check, and (2) the payees then typed under the latter statement the following legend, "'negotiated by named payees under protest and with reservation of all their rights,'"<sup>68</sup> then the payees could cash the check without previously communicating

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was an officer does not affect his individual liability as a guarantor. 358 So. 2d 105 (Fla. 3d DCA) (per curiam), *dismissed*, 360 So. 2d 1250 (Fla. 1978).

63. 354 So. 2d at 1235.

64. *Id.* at 1236.

65. *Id.* at 1237 (footnote omitted).

66. *Miller v. Jung*, 361 So. 2d 788, 789 (Fla. 2d DCA 1978). *See also* *Pino v. Lopez*, 361 So. 2d 192 (Fla. 3d DCA 1978), (per curiam). There, a creditor cashed a check on which the drawer had placed the legend, "[f]ull and final payment for all goods, services and claims to date." In a subsequent suit by the creditor, summary judgment was properly entered against him because his affidavit in opposition to the motion merely alleged conclusions of law without facts supporting his contention that an accord and satisfaction had not been entered into.

67. *Miller v. Jung*, 361 So. 2d 788, 789 (Fla. 2d DCA 1978).

68. *Id.*

this language to the drawer and would not be barred from suing the drawer for the unpaid balance of the account between the parties. The "reservation of all their rights" language was in accordance with section 1-207 of the UCC, which does not expressly require the communication of an acceptance under protest to the drawer prior to the cashing of the check. The court reasoned that to require actual notification of the reservation of rights prior to negotiation of the instrument would obviate the purpose of section 1-207, which is to minimize "impediments to the flow of commercial paper while reserving the rights of the immediate parties."<sup>69</sup> The court was careful to note that this decision would not bar proof on remand as to whether there had, in fact, been an accord and satisfaction.

### C. Defenses

One of the few defenses that a maker of a negotiable instrument can assert against a holder in due course under the UCC is that, under state law, the illegality of the transaction was such as to render the obligation of the party a nullity.<sup>70</sup> This defense was successfully established in *Paris v. Hilton*,<sup>71</sup> where the payee was a real estate broker licensed in Georgia but not in Florida. Section 475.01 of the Florida Statutes (1975) required registration of parties performing the duties of real estate agents or brokers in Florida; contracts to pay the commissions of unregistered brokers are void as part of the policy to protect the public from untrained or unsupervised real estate dealers.<sup>72</sup> Thus, the payee, who negotiated a real property sale in Florida and received promissory notes for his commission, could not recover on the notes because the obligation of the maker was voided as a result of the statute. The theory underlying the result also precluded any quantum meruit recovery.

In *Jacobs v. Becks*,<sup>73</sup> the issue of the proof of nonpayment necessary to establish a prima facie case for recovery on the promissory notes was resolved in favor of the payee. The payee's introduction of the notes into evidence in a suit against the estate of the deceased maker, the payee's mother, raised a presumption that the notes had not been paid.<sup>74</sup> The payee needed to provide no additional evidence

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69. *Id.*

70. U.C.C. § 3-305(2)(b).

71. 352 So. 2d 534 (Fla. 1st DCA 1977). The party's commission, for which the note was made in payment, amounted to \$315,070.

72. *Id.* at 535.

73. 355 So. 2d 1241 (Fla. 1st DCA), *cert. denied*, 362 So. 2d 1050 (Fla. 1978).

74. Apparently, both parties agreed that any testimony by the payee as to nonpayment would be barred by the dead man's statute. *Id.* at 1242 (citing FLA. STAT. § 90.05 (1975)).

of nonpayment because the notes themselves were evidence of the existence of the debt. Payment of the notes, an affirmative defense, would have to be proved by the defendant. The dissenting judge, however, pointed out that the payee did not testify that the note was in the payee's possession at the time of her mother's death. Thus, since the payee as personal representative of the deceased could have obtained the notes from her mother's effects after her death, no presumption of nonpayment should arise.<sup>75</sup>

#### D. Usury<sup>76</sup>

In *Ellis National Bank v. Davis*,<sup>77</sup> a case of first impression in Florida, the District Court of Appeal, First District, held that an intentional computation of interest by a bank at a rate of ten percent per annum, prorated on a 360-day, rather than 365-day basis, constitutes the exaction of usurious interest. Moreover, under the Uniform Banking Act,<sup>78</sup> if the lender is a national bank, it forfeits any interest not yet received and is required to pay the borrower twice the amount of any interest already received. When the parties have not agreed on a rate of interest for the loan, then the rate must be six percent per annum in accordance with a Florida statute.<sup>79</sup>

#### E. Bad Check Laws

The crime of obtaining property in return for a worthless check, as described in section 832.05 of the Florida Statutes (1975), does require proof that the accused knew that he had insufficient funds in the account to cover the check, but it does not require proof that he had an intent to defraud.<sup>80</sup> As a result, the standard jury instruction<sup>81</sup> which omits any mention of the intent to defraud is proper.

#### F. Escalation Clauses

The validity under Florida law of escalation or "indexing" clauses, which are based upon the devaluation of the dollar, is unclear. The "Gold Clause" Resolution, federal legislation prohibiting

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75. *Id.* at 1243, 1244-45 (Smith, J., dissenting).

76. For a discussion of other usury cases, see notes 114-121 & 233 and accompanying text *infra*.

77. 359 So. 2d 466 (Fla. 1st DCA 1978).

78. 12 U.S.C. § 86 (1976).

79. FLA. STAT § 687.01 (1977).

80. *State v. Berry*, 358 So. 2d 545 (Fla. 1978).

81. THE SUPREME COURT COMM. ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 203-04 (2d ed. 1975).

any obligation requiring payment in gold, in a particular kind of coin or currency, or in an amount measured thereby,<sup>82</sup> is inapplicable to obligations issued on or after October 28, 1977.<sup>83</sup> Thus, the result in *Shaughnessy v. REC Centers, Inc.*,<sup>84</sup> which appeared to cast some doubt on the viability of escalation clauses, will affect only these existing obligations. *Shaughnessy* involved a condominium recreational lease which contained an escalation clause.<sup>85</sup> A class action was brought to invalidate this provision under the Gold Clause Resolution. The trial court dismissed the complaint as not stating a cause of action, but the appellate court stated:

Whether that clause is one which, by definition and in the contemplation of the parties, (1) requires a particular kind of coin or currency, or (2) requires payment in money of the United States measured by gold or by a particular kind of coin or currency can only be determined upon appropriate proof and appellants should have the opportunity to present that proof.<sup>86</sup>

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82. 31 U.S.C. § 463 (1970). The statute provides:

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

83. Act of Oct. 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1229.

84. 361 So. 2d 807 (Fla. 4th DCA 1978).

85. The clause provided:

In the event that the United States dollar should ever be officially devalued by the United States government or replaced by a regular species of a lesser value, then and in that event the rental to be paid by the lessee to the lessor or any purchase price to the lessor by the lessee shall be increased in proportion to said devaluation so that the rental to be paid to the lessor or the purchase price of the property covered by this lease to be paid to the lessor shall be the same in terms of actual value as the United States dollar was on January 1, 1967.

*Id.* at 808. The Florida Legislature has recently passed a statute prohibiting the use of index clauses in condominium agreements. 1976 Fla. Laws ch. 76-222, § 1 (codified at FLA. STAT. §§ 718.302(3), .401(8) (Supp. 1976)); see *Schlytter v. Baker*, 580 F.2d 848 (5th Cir. 1978) (upholding prospective application of these statutes).

86. 361 So. 2d at 809.

Although this case involved a lease rather than a negotiable instrument, the doubt about the validity of escalation clauses would also affect negotiable instruments bearing these clauses.<sup>87</sup> Foreign money clauses in negotiable instruments, as permitted by section 3-107 of the UCC, however, might be a way of avoiding this problem.<sup>88</sup>

### G. Legislation

A new Computer Crimes Act<sup>89</sup> provides that anyone who commits a computer-related act for the purpose of devising or executing any scheme or artifice to defraud is guilty of a felony of the second degree. The Act seems to be drafted in a strange manner. For example, the phrase "financial instrument"<sup>90</sup> is defined in great detail as constituting written checks, notes, and so on; however, it is not used in the remainder of the Act. Moreover, the definition of "financial instrument" makes no reference to current section 674.4-104(1)(g) of the Florida Statutes (1977) which, with respect to bank deposits and collections, defines the word "item" as including any "electronically recorded, stored, or transmitted message for the payment of money."

Another new statute concerning negotiable instruments authorizes the Department of Education to sell student loan notes to the federal Student Loan Marketing Association and to enter into agreements to repurchase these notes from the federal association.<sup>91</sup>

### V. SURETIES AND GUARANTORS

Recent Florida case law concerning guarantors of construction loans clarifies the defenses available in particular situations. *Schaeffer v. Gilmer*<sup>92</sup> involved a written guaranty agreement which referred to various conditions precedent to the disbursement of loan proceeds as set out in the construction loan agreement. The court held that the two instruments had to be construed together. Although this did not alter the express terms of the guaranty, it permitted the guarantors, under their guaranty agreement, to assert

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87. *Id.* (discussing *Aztec Prop., Inc. v. Union Planters Nat'l Bank*, 530 S.W.2d 756 (Tenn. 1975) (invalidating indexing clause in promissory note).

88. For instance, one could require payment in United States dollars measured by German marks as of the day payment is due.

89. FLA. STAT. § 815.01-.07 (Supp. 1978).

90. *Id.* § 815.03(9).

91. *Id.* § 239.72(3).

92. 353 So. 2d 847 (Fla. 1st DCA 1977).

affirmative defenses growing out of the construction loan agreement.<sup>93</sup>

Another affirmative defense was successfully asserted by the guarantors of a construction loan in *Warner v. Caldwell*.<sup>94</sup> Because a construction lender impaired the security by reducing a construction bond and by changing a fixed price construction contract to a "cost plus" contract without the consent of the guarantors, they were released from their guaranty even though the original guaranty agreement contained wide-ranging waiver clauses<sup>95</sup> as to extensions of time, modification of security, and other pertinent matters. Guaranties will lose most of their utility, however, if the courts persist in ignoring the contractual and economic facts.

Similarly, the District Court of Appeal, First District, has indicated that the negligence of a construction lender in the supervision and management of a construction loan fund and of the work of the contractor would release guarantors of the debtor-owner of the project, in spite of the fact that the guaranty agreement gave the bank *carte blanche* to waive and release the security, to release or substitute collateral, and so on.<sup>96</sup>

It is a relatively common practice for lessors of personal property to require that the lease be guaranteed by parties who are not lessees. When the lease provides for a waiver of a jury trial by the lessees, this waiver may be effective against them, but it will not be effective against the guarantors. Upon the guarantors' assertion that the lease was in substance a loan and that the installment payments yielded a usurious rate of return in excess of thirty percent per annum, the guarantors, who were not parties to the lease, will be entitled to a jury trial.<sup>96</sup>

In another case involving guaranteed rent payments, the stockholders of a lessee corporation executed a continuing guaranty of payment to the lessor, his heirs and assigns. The lessor sold the property and assigned the lease, together with all past and future rents due under the lease, to the grantee. The District Court of Appeal, Fourth District, held that the grantee could enforce the guaranty against the guarantors because the transfer of the lease operated also as an assignment of the guaranty. In addition, the

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93. The court also made extensive rulings on the various affirmative defenses. Unfortunately, the terse style of the opinion does not make clear the analysis behind the conclusions the court makes.

94. 354 So. 2d 91 (Fla. 3d DCA 1977), *cert. denied*, 361 So. 2d 836 (Fla. 1978).

95. *Gartner v. Atlantic Nat'l Bank*, 350 So. 2d 495 (Fla. 1st DCA 1977) (*per curiam*). Judge Smith's strong dissent, however, would seem to be the correct view.

96. *Central Inv. Assocs. v. Leasing Serv. Corp.*, 362 So. 2d 702 (Fla. 3d DCA 1978).

court decided that although the lessor reduced the monthly rent in order to rent the premises, which the lessee corporation had abandoned, the guarantors were not released from liability because the rent reduction was not a material change operating to the guarantors' detriment.<sup>97</sup> This holding as to the definition of a material alteration is of dubious precedential value, however, since one of the Florida authorities cited by the court is irrelevant<sup>98</sup> and the other is a minority view<sup>99</sup> advanced by an anonymous encyclopedia author.<sup>100</sup>

A guarantor may be precluded from using an alteration as a defense if he complies with the change without asserting his rights. In *Gulfstar, Inc. v. Borg-Warner Acceptance Corp.*,<sup>101</sup> the guarantor of a loan made to a retailer knew that the lender had relaxed the repayment provisions of the loan. Since the guarantor failed to object and continued to perform, he was held to have waived his rights to raise this modification as a defense when he was called upon to pay due to the default of the principal debtor.<sup>102</sup>

In *Spurrier v. United Bank*,<sup>103</sup> the guarantors of the loan obligation of the corporate debtor unsuccessfully asserted the defense of unauthorized execution of the promissory notes by the agents of the corporation. The corporation had earlier filed with the lender bank a corporate resolution which provided that "James R. Latham, Pres., Lowell V. Summerhays, Sec., are hereby authorized to exe-

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97. *Rizzi v. Serv. Dev. Corp.*, 354 So. 2d 898 (Fla. 4th DCA 1978).

98. The court, in a footnote, referred to two Florida cases. *Id.* at 900 n.4. Neither attempted to define the elements of a material change or to relate materiality to a detrimental effect on the guarantor. The first, *Anderson v. Trade Winds Enterprises*, 241 So. 2d 174 (Fla. 4th DCA 1970), held that extensions of time for payment accorded to the maker by the holder of a note in default did not discharge the liability of the guarantors because the extensions did not affect the guarantors' rights against the maker. *Id.* at 178. The second Florida case cited as authority, *Hollywood Shopping Plaza, Inc. v. Schuyler*, 179 So. 2d 573 (Fla. 2d DCA 1965), did concern materiality, but the court used the term only in a conclusory manner and did not define it in any fashion. The court made no reference to the detriment of the guarantors. *Id.* at 574.

99. *Hollywood Shopping Plaza, Inc. v. Schuyler*, 179 So. 2d 573 (Fla. 2d DCA 1965). For a discussion of the majority view, see H. ARANT, *HANDBOOK OF THE LAW OF SURETYSHIP AND GUARANTY* 264-84 (1931); W. HAWKLAND, *CASES AND MATERIALS ON COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS* 135-36 (1967); L. SIMPSON, *SURETYSHIP* 339-47 (1950); A. STEARS, *LAW OF SURETYSHIP* 97-130 (3d ed. 1922).

100. *Rizzi v. Serv. Dev. Corp.*, 354 So. 2d 898, 900 n.4 (Fla. 4th DCA 1978) (citing 38 AM. JUR. *Guaranty* § 81 (1968)).

101. 360 So. 2d 454 (Fla. 3d DCA 1978) (per curiam).

102. See *Regal Shoe Shops v. Kleinman*, 361 So. 2d 765 (Fla. 3d DCA 1978), wherein the court applied the suretyship law of New York to a lease guaranty. Since the lease was modified with the apparent consent of the guarantor, an officer of the lessee corporation, the alteration could not operate as a defense for the guarantor.

103. 359 So. 2d 908 (Fla. 1st DCA 1978).

cute and deliver the promissory note or notes of this corporation.' ”<sup>104</sup> The bank loaned money to the corporation on the basis of notes correctly signed by Latham but not by Summerhays; another man signed his name to the line labeled secretary. The court refused to allow the guarantors’ denial of liability, which was grounded on the fact that the notes were not executed in accordance with the corporate resolution filed with the bank. The court determined that the resolution was ambiguous because it did not clearly state whether the signatures of both or either of these persons would be sufficient. Hence, a corporate note signed by James Latham above the line labeled secretary might come within the terms of this corporate resolution. Furthermore, the court reasoned that even if there had been unauthorized execution of the notes, the signatures could have been ratified by the corporation or it could have been estopped to deny their authority because the corporation had received and retained the proceeds of the notes.<sup>105</sup>

Another affirmative defense which was unsuccessfully asserted by a guarantor is that of the statute of limitations as a bar to liability. When a guarantor promises to be responsible for debts to be incurred in the future by the principal debtor, the statute of limitations on this guaranty promise starts to run not from the date of the promise but from the date of default in payment by the principal debtor.<sup>106</sup>

Although a guaranty can, in appropriate circumstances, be revoked, the modification or revocation must be both timely and in accordance with any requirements of the guaranty agreement in order to be effective. Thus, in *Lea Industries, Inc. v. Raelyn International, Inc.*,<sup>107</sup> the guarantors were not able to assert this defense successfully because the revocation was inadequately made. An absolute continuing guaranty provided that it would bind the guarantors for future sales “ ‘until the same is revoked by the undersigned in writing and delivered . . . by registered or certified mail.’ ”<sup>108</sup> The court held that the agreement was not modified by letters sent by one of the guarantors to the seller telling it not to ship goods covered by all pending orders, because the letters did not conform to the criteria for revocation specified in the guaranty agreement. The buyer and its guarantors were, as a result, liable for goods that were

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104. *Id.* at 909.

105. The corporation, as maker of the notes, was one of the defendants. The effect of the ratification rationale on the liability of the guarantors was not made clear by the opinion. See *id.* at 909.

106. *Toms v. Sentinel Star Co.*, 360 So. 2d 490 (Fla. 4th DCA 1978).

107. 363 So. 2d 49 (Fla. 3d DCA 1978).

108. *Id.* at 51.



subsequently shipped in accordance with pending orders for which final payment was not made.

On the other hand, a guarantor of a promissory note who, prior to the lender's acceptance of a renewal note from the primary obligor, communicates to the lender that the guaranty is revoked will not be liable as a guarantor of the renewal note.<sup>109</sup>

It is reversible error for a court to award one guarantor an award of fifty percent against a co-guarantor on a contribution basis when there was a third solvent co-guarantor because each guarantor would normally be liable for only one-third of the amount remitted to the payee of the promissory note. The District Court of Appeal, Third District, noted that the two guarantors had not informed the trial court that a third guarantor was obligated on the note;<sup>110</sup> however, inasmuch as the notes did bear the signatures of three guarantors, it seems strange that the trial court did not raise the issue itself.

## VI. MORTGAGES

### A. *Execution of Mortgages*

The Supreme Court of Florida has held that there is no longer any requirement that a mortgage of homestead realty be signed in the presence of two attesting witnesses. The present constitution eliminated the words "duly executed" which were found in the former constitution and under which the courts had held that the attestation by two witnesses was required.<sup>111</sup>

The District Court of Appeal, First District, followed this rule when it held that where a deed is invalid because it is not witnessed by two people, it may, nevertheless, constitute a mortgage which does not require two subscribing witnesses if proof is presented that the agreement was intended by the parties to secure an indebtedness rather than to convey title.<sup>112</sup>

### B. *Prepayment Deadlines*

In regard to prepayment deadlines, the District Court of Ap-

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109. *Miami Int'l Bank v. First Int'l Realty Inv. Corp.*, 364 So. 2d 873 (Fla. 3d DCA 1978) (per curiam).

110. *Hanrahan v. Barry*, 363 So. 2d 54 (Fla. 3d DCA 1978).

111. *Moxley v. Wickes Corp.*, 356 So. 2d 785 (Fla. 1978). The former constitutional provision had required that mortgages of homestead property be "duly executed." The courts had interpreted this phrase to mean that two witnesses were required. The court observed that the phrase "duly executed" had been deleted from the new constitution and, as a result, the presence of two attesting witnesses would no longer be required.

112. *Walker v. City of Jacksonville*, 360 So. 2d 52 (Fla. 1st DCA 1978).

peal, First District, has adhered to the traditional rule that the courts will not rewrite or interfere with a valid contract. Only where the facts indicate that the prepayment penalty is exorbitant will the court intervene in the enforcement of the penalty by upholding a mortgagor's claim that the payment unjustly enriches the mortgagee.<sup>113</sup>

### C. Usury

The amendment to section 687.11(4) of the Florida Statutes<sup>114</sup> was not intended by the legislature to remove the interest limitation of fifteen percent per annum from loans in excess of \$500,000 to corporations, but rather it was intended to remove a former inconsistency between the interest rates payable by an individual as a maker as contrasted with a person who becomes an accommodation party on loans in excess of the \$500,000 figure. Under this interpretation, an individual who is a surety or guarantor of a promissory note in excess of \$500,000 can legally be charged fifteen percent interest in the event that the corporate maker is unable to pay all of the amount owing.<sup>115</sup>

If an alleged lender should purchase the debtor's property and then give the debtor a binding option to repurchase the property, this arrangement will be deemed a disguised mortgage transaction, and if the difference between the purchase price and the repurchase price is great enough, the transaction can be deemed usurious.<sup>116</sup> This "sale-option" concept has been extended to a case wherein the debtor-vendor, although not bound to repurchase the property according to the terms of the transaction, was economically bound to repurchase because there was a vast disparity between the sales price and the true value of the debtor's equity in the property.<sup>117</sup>

The District Court of Appeal, Third District, decided one of the most comprehensive usury cases in recent years, *Continental Mortgage Investors v. Sailboat Key, Inc.*<sup>118</sup> One of the primary issues involved in the case was a conflict of laws question—whether Massachusetts or Florida law would apply. The agreement had stated that Massachusetts law would govern, and under Massachusetts law the contract was legal. The court, nevertheless, found that Florida law would control the case because the contract was usurious

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113. *Century Fed. Sav. & Loan Ass'n v. Madorsky*, 353 So. 2d 868 (Fla. 1st DCA 1978).

114. 1974 Fla. Laws ch. 74-232, § 2.

115. *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14 (Fla. 1977).

116. *Mears v. Mayblum*, 96 So. 2d 223 (Fla. 1957).

117. *Bermil Corp. v. Sawyer*, 353 So. 2d 579 (Fla. 3d DCA 1978).

118. 354 So. 2d 67 (Fla. 3d DCA 1978) (per curiam).

and there was strong public policy in Florida against usury. Furthermore, Massachusetts had no real connection with the agreement because the loan papers had been prepared in Florida, the land was located in Florida, the loan funds were disbursed in Florida and the lender's advisor company was a Florida firm. The reference to Massachusetts law was a bad faith effort to evade the usury laws of Florida.

A second key issue in the case was whether the debtor could plead usury as a defense to a foreclosure suit even though the two-year statute of limitations,<sup>119</sup> which ran from the time that the contract was first entered into, had expired. The court ruled that the statute of limitations had not run because the parties had entered into a subsequent mortgage agreement and the usury became a part of this later transaction, which was not time barred. In addition, even if the statute of limitations had expired, the defense of usury is always available where the lender brings a suit to foreclose the loan. On other issues, the court held that the value of the debtor's corporate stock taken by the lender was correctly considered as interest where the stock had a specific value at the time it was issued to the lender and such value was not contingent upon the success of the venture which was financed by the loan. Under the penal statute for usury, section 687.11(4) of the Florida Statutes (Supp. 1974), the penalty for charging a usurious interest rate to a corporation is twice the amount of interest to be paid on the loan when the amount of the loan exceeds \$500,000. Finally, the court held that since the penal statute for usury was not in effect when the loan in question was entered into, the statute could not be applied to the lender.

When a lender charges a "mortgage loan discount" which is deducted from the loan proceeds, it is a question of fact whether this amount is to pay the lender for out-of-pocket expenses in servicing and making the loan or is interest which, provided that a corrupt intent is shown, might render the loan usurious. This question of fact cannot be decided in a summary judgment proceeding.<sup>120</sup>

If a mortgage provides that the lenders are to participate in the profits of a development venture in the event houses are built and sold, but the venture failed with no houses ever being built and the participation clause was not in the note, then the transaction will not be deemed usurious.<sup>121</sup>

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119. FLA. STAT. §§ 687.071(2) & 775.15(2) (c) (1975).

120. *Abromowitz v. Barnett Bank*, 356 So. 2d 329 (Fla. 4th DCA 1978).

121. *Schwab v. Quitoni*, 362 So. 2d 297 (Fla. 3d DCA 1978).

### D. Documentary Taxes

The District Court of Appeal, First District, has held that when a recorded minor amendment modestly increased the amount of the original note and mortgage and provided for a few other modifications, it is not to be deemed a promissory note and, as a result, documentary stamps are due only for the increased amount and not for the original amount for which documentary stamp taxes were already paid.<sup>122</sup> The court based this ruling on the fact that there had been no intention manifested to discharge the original loan or to make a new promise to pay the original amount. Rather, the amendment went solely to the additional sum loaned. This approach is one way of reducing the amount of documentary stamp taxes which might otherwise be due on "wrap-around mortgages."

In a subsequent case, the First District resolved a similar issue in a questionable decision. The court again held that additional documentary stamps on the amount of the original promissory note were not required. In this case, however, the amount of the loan was increased after documentary stamps had been affixed; the debtor signed a second promissory note for the original borrowed amount and the advance. The First District decided that documentary stamps were needed only for the advance in accordance with section 201.09(1) of the Florida Statutes (1975). The dissenting judge, in contrast, pointed out that the statute only covers an extension of the original note, not an enlargement thereof, and that the statute would seem to impose documentary stamps on the full amount including the original principal and the advance.<sup>123</sup>

The First District has also held that the documentary stamp tax on a deed given to a mortgagee in lieu of foreclosure should be based upon the value of the property conveyed. There was a purchase money mortgage of \$665,000 on land and the purchaser then gave a second mortgage to another for \$200,000. The mortgagor subsequently deeded the land back to the seller in satisfaction of the \$665,000 mortgage and the seller-grantee assumed the \$200,000 mortgage on the basis that the mortgagor was insolvent and the property was worth only \$450,000. The court held that documentary stamps based upon a consideration of \$450,000, not \$865,000, should be placed on the deed. Normally, the stamps would be based upon the assumption that the value of the mortgaged land was equal to the amount of the debt, but here the facts showed that the land was

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122. *Rainey v. State Dep't of Revenue*, 353 So. 2d 207 (Fla. 1st DCA 1977).

123. *State Dep't of Revenue v. Miami Nat'l Bank*, 354 So. 2d 84 (Fla. 1st DCA 1977).

actually worth considerably less than the total debt consisting of the two mortgages.<sup>124</sup>

When \$11,700 was lent and a promissory note provided that the borrower would repay \$20,127.60 payable in 180 monthly installments of \$111.82 and it further provided that the amount financed was \$11,700 with the difference of \$8,427.60 as a finance charge over the life of the loan, documentary stamps were due only on the principal sum of \$11,700 and not on the total sum of \$20,127.60 under section 201.08(1) of the Florida Statutes (1973). The court noted that there is no legal difference between this form of a note and one which states that the principal amount is \$11,700 and which provides that the maker is bound to pay interest and principal until the note is paid in equal periodic payments, such payments to be applied first to the payment of principal with the privilege of prepayment. This latter note would be subject to stamp taxes for \$11,700 and not for the added interest.<sup>125</sup>

Pursuant to sections 201.01 and 201.08 of the Florida Statutes (1975), in a good faith transaction where the last essential signature required on a promissory note and mortgage encumbering Florida land was made in Georgia to a loan association located in Georgia, there was no taxable situs in Florida. Thus, documentary stamp taxes could not be assessed.<sup>126</sup>

In *State Department of Revenue v. Zuckerman-Vernon Corp.*,<sup>127</sup> the Supreme Court of Florida held that the good faith of the taxpayer in affixing less than the required amount of documentary stamps to a transaction is not enough to justify the lessening of statutory penalties, the imposition of which was mandatory under the former Florida statute governing penalties for failure to pay the tax.<sup>128</sup> In addition, the court evidently accepted prior case law exempting from the documentary stamp tax a conveyance of property by a trustee not pursuant to a sale.<sup>129</sup> The facts of this case, however,

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124. *Keebler v. Department of Revenue*, 360 So. 2d 77 (Fla. 1st DCA 1978).

125. *Department of Revenue v. North Port Bank*, 354 So. 2d 463 (Fla. 1st DCA 1978).

126. *Rainey v. Department of Revenue*, 354 So. 2d 387 (Fla. 1st DCA 1978).

127. 354 So. 2d 353 (Fla. 1977).

128. The court imposed the statutory penalty pursuant to FLA. STAT. § 201.17(2) (1975), which required payment of the penalty. The taxpayer contended that this statute was inapplicable and that the amended version, which is the present statute, was controlling. FLA. STAT. § 201.17(2) (1977) does not make payment of a 100% penalty mandatory. Instead, the present statute provides for a 100% penalty if fraud is proven; otherwise, the penalty is equal to 25% of the purchase price of the documentary stamps not affixed. The court was not persuaded by this argument for retroactivity of the more liberal amended statute. It allowed only prospective application.

129. 354 So. 2d at 354-55 (discussing *River Park Joint Venture v. Dickinson*, 303 So. 2d 654 (Fla. 1st DCA 1974)).

did not qualify for the exemption. Although there was a joint venture agreement naming the corporation as trustee of the land which was sold, no express trust was created because the corporation used its own funds to purchase the land and took title solely in its corporate name so that the corpus of the trust was never within the dominion of the purported donor, the joint venturer.<sup>130</sup>

The District Court of Appeal, Third District, held that a transfer of mortgaged property by a subsidiary corporation to its parent without the payment of any additional consideration is subject to documentary stamp taxes computed upon the amount of the encumbrance because it is a shifting of the economic burden of paying the mortgage. The fact that the tax was not paid as a result of a good faith belief that it was not due is not sufficient to prompt a reduction in the penalty assessed for nonpayment.<sup>131</sup>

The District Court of Appeal, First District, held that because the Florida Bar is an official arm of the Supreme Court of Florida, when it executes a note and mortgage in order to borrow money, the state documentary stamp taxes may not be levied upon the transaction. Under article II, section three of the Constitution of the State of Florida, which requires the separation of governmental power into three branches, the legislature may not levy a tax upon the judiciary because it is a separate branch of the government.<sup>132</sup>

Sections 201.02 and 201.021 of the Florida Statutes (1975) provide that the amount of the documentary stamp tax levied on deeds of conveyance of real property shall be determined by the consideration paid in the transaction. The Department of Revenue sought, through rule 12A-4.13(22) of the Florida Administrative Code, to assess the tax on conveyances of land by development firms by determining the value of the land plus the value of improvements to be constructed thereon at a later time. The District Court of Appeal, First District, invalidated the rule, finding that it was without statutory basis because the rule would extend the tax beyond the limits established by legislative authority in the relevant statutes. The court held that only the value of the land could be subject to the documentary stamp tax.<sup>133</sup>

The First District also determined the proper application of

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130. The result might have been different if the corporation had been a party to the joint venture agreement. The joint venture agreement was made by two parties, one of whom was the sole owner of the corporation. This stockholder, however, executed the agreement solely in an individual capacity. *Id.* at 356.

131. *Win-San Bldg. Corp. v. Department of Revenue*, 358 So. 2d 112 (Fla. 3d DCA 1978).

132. *Florida Bar v. Lewis*, 358 So. 2d 897 (Fla. 1st DCA 1978).

133. *Department of Revenue v. Young Am. Builders*, 358 So. 2d 1096 (Fla. 1st DCA 1978).

section 201.02(1) of the Florida Statutes to the assignment of a leasehold subject to existing mortgages. The assignee did not assume the mortgages but did make substantial mortgage payments subsequent to the assignment of the lease. The Department of Revenue sought to assess the documentary stamp tax on the amounts of the mortgages. The court determined that the consideration upon which the tax is based must have a reasonably determinable pecuniary value in order to support the tax. Where a mortgage is assumed, or where there is a conveyance in fee subject to a mortgage, the consideration is sufficiently definite to satisfy the criterion. The assignment of leasehold subject to a mortgage, however, does not constitute reasonably determinable consideration unless the assignee assumes the obligation. The assignee "need pay the mortgage to protect his interest only as long as his leasehold interest continues, and that interest may terminate in any of a multitude of ways. The economic burden of paying the mortgage is contingent upon continuation of the leasehold."<sup>134</sup> Thus, the tax cannot be imposed on the basis of the unassumed mortgages because the situation is akin to that of paying rent, and leases are ordinarily not subject to documentary stamp taxes because the consideration is executory and, therefore, eludes definite valuation.

A Class C intangible tax is imposed on all promissory notes secured by mortgages on real property.<sup>135</sup> The amount of the tax is determined by the face amount of the obligation. The tax must be paid prior to recording the mortgage; the only exception is for mortgages providing for future advances, in which case the tax is payable when the advances are made.<sup>136</sup> When Class C intangible taxes are paid on the full face amount of construction mortgages and the full face amount is never disbursed, claims for refund must, under section 215.26(2) of the Florida Statutes, be made within three years of the payment of the tax.<sup>137</sup> Thus, if a mortgage is to secure further advances, then the intangible tax is to be paid on the original advance and on all subsequent advances when they are actually made. If construction loans can be fitted within the future advance provision and taxes are paid only when the advance is made, the problem of a refund is obviated.

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134. *Department of Revenue v. Dix*, 362 So. 2d 420, 422 (Fla. 1st DCA 1978).

135. FLA. STAT. § 199.032 (1977).

136. *Stewart Arms Apts., Ltd. v. Department of Revenue*, 362 So. 2d 1003, 1004 (Fla. 4th DCA 1978).

137. *Id.* at 1005 (construing Fla. Stat. § 215.26(2) (1971)).

### E. *Equitable Liens*

In a case of first impression in Florida, the District Court of Appeal, First District, held that mere agreement, albeit written and duly recorded, by the debtor not to sell or encumber real property did not create an equitable lien or mortgage in favor of the creditor. The court, however, implied that if the agreement evidenced the parties' intent to make the property security for the debt, then an equitable mortgage or lien may have been created. In addition, the court ruled that a written, recorded option to purchase property did not constitute an equitable interest in the land, but such an option did act as a valid encumbrance on the land, binding all successors in interest who had real or constructive notice by the recording.<sup>138</sup>

The District Court of Appeal, Second District, refusing to follow a decision of the Third District,<sup>139</sup> held that a letter sent by clients to their attorneys stating that the clients were thereby giving to the attorneys all of their right, title and interest in certain real property and the proceeds from same as security for legal fees and other debts was sufficient to create an equitable lien on the property in favor of the attorneys. The Second District found that although the assignment was not sufficient to create a lien or mortgage, the letter manifested an intent that the assigned property serve as security. This intent was sufficient to create an equitable lien.<sup>140</sup>

### F. *Defenses*

Generally, a mortgage is not binding and enforceable unless it is supported by sufficient consideration. The District Court of Appeal, Third District, held that where a mortgagor agreed to execute a mortgage in favor of the mortgagee so that the mortgagee could assign the mortgage and use it as a downpayment on a business, the mortgage is not founded upon sufficient consideration. At no time was there a debt existing between the mortgagor and the mortgagee. Because the mortgagor had received no benefit and the mortgagee had suffered no detriment, the court found that the mortgage was unenforceable due to lack of consideration. The court implied that if, instead of being assigned, the mortgage had been executed directly to the third party assignee of the mortgage, then sufficient consideration probably would have been present.<sup>141</sup>

On the other hand, failure of consideration, rather than a total

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138. *Hansen v. Five Points Guar. Bank*, 362 So. 2d 962 (Fla. 1st DCA 1978).

139. *Mason v. Antonacci*, 342 So. 2d 546 (Fla. 3d DCA 1977).

140. *Amacher v. Keel*, 358 So. 2d 889 (Fla. 2d DCA 1978).

141. *Kremser v. Tonokaboni*, 356 So. 2d 1331 (Fla. 3d DCA 1978).



absence thereof, will not render a mortgage subject to rescission unless accompanied by some other ground. Thus, where a mortgagor tried to rescind a mortgage because the mortgagee had failed to release part of the encumbered land at the closing of the transaction as earlier agreed, rescission was not justified because the failure of consideration was not accompanied by fraud, misrepresentation, overreaching or undue influence. The court reasoned that although the failure to release the land amounted to breach of a dependent covenant, which might warrant the remedy of rescission, the mortgagor had an adequate remedy at law for damages under the circumstances of the case and rescission should not be granted. Thus, the court reinstated the mortgagee's foreclosure proceedings and allowed the mortgagor to assert a counterclaim for damages.<sup>142</sup>

In a case of first impression in Florida, the District Court of Appeal, First District, held that a real property mortgage securing a promissory note does not become a secured transaction under section 9-104(10) of the UCC when the mortgage and note are assigned by the mortgagee as security for a bank loan.<sup>143</sup> Instead, the transaction is properly governed by the real property laws. The assignee bank had recorded the assignment of the mortgage but did not give notice to the mortgagor or perfect a security interest. After the assignment was recorded, the mortgagor paid the entire sum due to the mortgagee, for which the mortgagor obtained and recorded a satisfaction. The mortgagor failed to investigate whether the mortgage had been assigned. Subsequently, the mortgagee defaulted in the loan payments and the bank foreclosed the mortgage. The First District decided that the mortgagor could not defeat the foreclosure by attempting to bring into play the provisions of article 9 of the UCC. The court also noted that the mortgagor failed to demand that the mortgagee surrender the mortgage upon payment of the debt. This observation is loosely worded, at best. The original mortgage can be destroyed after recording and it has no effect; the court must have had in mind the rule that the negotiation of the promissory note is also a negotiation of the mortgage and the maker of the note pays it at his peril without a surrender of it.

The defenses of estoppel or waiver may be available to a mortgagor if the mortgagee attempts to reform the mortgage. Thus, when a mortgagee accepted mortgage payments in mistaken amounts for seventeen months without protesting to the mortgagor and then waited an additional ten months before filing suit to reform the

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142. *Duncan Properties, Inc. v. Key Largo Ocean View, Inc.*, 360 So. 2d 471 (Fla. 3d DCA 1978).

143. *Rucker v. State Exch. Bank*, 355 So. 2d 171 (Fla. 1st DCA 1978).

mortgage to conform to a deposit receipt agreement, the suit should be dismissed on the basis of either waiver or estoppel.<sup>144</sup>

Another defense available to a mortgagor in a foreclosure suit is that the mortgagor lacked capacity to enter into the contract. Under Florida law, a corporation may not purchase its own stock if doing so would deplete the capital surplus of the firm.<sup>145</sup> Thus, a mortgage given by a corporation to a stockholder as partial consideration for the purchase of his stock is void and unenforceable when the purchase price exceeds the capital surplus of the corporation.<sup>146</sup>

In a factually peculiar case, the District Court of Appeal, First District, found a note and mortgage unenforceable. The builder who held the mortgage had recklessly constructed the mortgagor's house on the wrong property. The court also denied the builder's claims for return of the house.<sup>147</sup>

### G. Foreclosure

Although a mortgagee may foreclose a mortgage and take possession of the mortgaged property, the mortgagee does not take completely free and clear, but must assume the obligations that run with the property. Thus, when a mortgagee forecloses on a condominium unit which was subject to a recreational lease, the mortgagee remains liable to make payments under such lease.<sup>148</sup>

An agreement purporting to modify the terms of a note and mortgage must be carefully drawn in order to achieve its intended purpose. The District Court of Appeal, First District, found ineffective an agreement between the Small Business Administration (SBA) and the mortgagees which provided that the mortgagees would give thirty days notice to the SBA before instituting foreclosure proceedings. The promise was made to induce the SBA to grant a loan to the mortgagors to repair damage to the mortgaged property. The court held that the agreement did not constitute a modification of the mortgage so as to require the mortgagees to give thirty days notice before accelerating the entire debt upon default by the mortgagors. The court declined to give the undertaking effect beyond its terms. The required notice was for foreclosure and not for acceleration.<sup>149</sup>

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144. *Thompson v. Gross*, 353 So. 2d 191 (Fla. 3d DCA 1977).

145. FLA. STAT. § 608.13(9)(b) (1977).

146. *Naples Awning & Glass, Inc. v. Cirou*, 358 So. 2d 211 (Fla. 2d DCA 1978).

147. *Jim Walter Homes, Inc. v. Johns*, 361 So. 2d 825 (Fla. 1st DCA 1978).

148. *City Nat'l Bank v. Home Fed. Sav. & Loan Ass'n*, 356 So. 2d 814 (Fla. 4th DCA 1978).

149. *Bolling v. Lamberson*, 352 So. 2d 532 (Fla. 1st DCA 1977).

The Department of Housing and Urban Development (HUD) has promulgated procedural guidelines for foreclosing federally-insured mortgages in default.<sup>150</sup> Although these guidelines are not mandatory, failure of the mortgagee to comply with the rules may be raised by the mortgagor as an equitable defense to foreclosure proceedings.<sup>151</sup>

Generally, a mortgagee is not justified in seeking a mortgage foreclosure when the breach of the mortgage agreement is merely technical. In *Delgado v. Strong*,<sup>152</sup> however, the Supreme Court of Florida established that even a technical default may, in certain circumstances, warrant foreclosure. The mortgagors' failure to secure insurance was not only a technical default in the terms of the mortgage, but also sufficient ground for the mortgagees' belief that the security of the mortgage was in jeopardy. As a result, the mortgagees were justified in accelerating the balance due on the mortgage.

When a foreclosure sale is made through the judicial sales procedures provided by section 45.031 of the Florida Statutes (Supp. 1978), a correct legal description of the property must be contained in the notice of sale. If an error is made in the description, any sale made under the incorrect description should be vacated and the property resold.<sup>153</sup>

A defendant in a mortgage foreclosure action brought by a bank has the right to attempt discovery of Florida and federal inspection reports obtained from the bank dealing with this loan, but, under section 658.10(1) of the Florida Statutes (1975), the judge should make an *in camera* inspection of the Florida records before turning them over to the defendant. As to the federal report, Federal Deposit Insurance Corporation Regulation No. 309 provides that these reports are the property of the F.D.I.C. and are not to be disclosed. Therefore, the defendant must attempt to secure the reports from the F.D.I.C., and a court should not compel the plaintiff bank to produce copies of the reports.<sup>154</sup>

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150. *Cross v. Federal Nat'l Mortgage Ass'n*, 359 So. 2d 464, 465 (Fla. 4th DCA 1978). "Specifically, these guidelines direct that the agency contact a mortgagor in default and make substantial efforts to try to rectify the default by assisting the mortgagor in various ways." *Id.*

151. *Id.*

152. 360 So. 2d 73 (Fla. 1978).

153. *Hyte Dev. Corp. v. General Elec. Credit Corp.*, 356 So. 2d 1254 (Fla. 3d DCA 1978).

154. *Hialeah-Miami Springs First State Bank v. B.S. Enterprises*, 353 So. 2d 1243 (Fla. 3d DCA 1978).

## H. Deficiency Judgments

In general, the power to grant deficiency decrees rests in the sound discretion of the court. The decision to deny a deficiency judgment in mortgage foreclosure actions must, however, be supported by sound and sufficient reasons. In *Hamilton Investment Trust v. Escambia Developers, Inc.*,<sup>155</sup> the District Court of Appeal, First District, held that this standard is satisfied when the testimony shows that the value of the foreclosed property exceeds the amount owed under the mortgage.

In the event that a mortgage and promissory note provide that the encumbered land is to stand as sole security for the debt and that there is to be no recourse against the maker-mortgagor, then, of course, the mortgagee is not entitled to a deficiency judgment against the maker-mortgagor after foreclosure.<sup>156</sup> Such a promissory note would not be negotiable because it would not be an unconditional promise to pay but, in fact, a promise to pay out of a particular fund.<sup>157</sup>

Finally, a mortgagee who is the high bidder at a foreclosure sale should not, in the absence of specific provisions to the contrary in the final judgment of foreclosure, be treated differently from any other bidder. Where the final judgment is silent as to who pays the cost of documentary stamps when the mortgagee is the successful bidder, the mortgagee would not be entitled to be reimbursed for this tax because a purchaser normally would not be so reimbursed unless the court explicitly directed the repayment.<sup>158</sup>

## I. Construction Loans and Mechanics' Liens

In order for a court to impose an equitable lien, factors such as fraud, deception or material misrepresentation must be present. Absent such a showing, the failure of a lending institution to advance remaining funds under a construction loan to the project owner does not justify a court in creating an equitable lien in the undisbursed funds for the benefit of the insolvent owner's creditors.<sup>159</sup> On the other hand, a construction lender who has foreclosed its mortgage and has acquired title to the improved property should not be allowed to keep the property and, at the same time, refuse

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155. 352 So. 2d 883 (Fla. 1st DCA 1977).

156. *Heim v. Kirkland*, 356 So. 2d 850 (Fla. 4th DCA 1978).

157. U.C.C. §§ 3-104 (1)(b), -105(2)(b) (criteria for negotiability).

158. *Tymber Skan Properties Ltd. v. Lutheran Mut. Life Ins. Co.*, 358 So. 2d 1370 (Fla. 2d DCA 1978).

159. *Chase Manhattan Bank v. S/D Enterprises, Inc.*, 353 So. 2d 131 (Fla. 3d DCA 1977) (per curiam).

to disburse construction funds to the contractor who had finished construction. As a result, it is only fair to allow the contractor an equitable lien against the foreclosing construction lender for the balance of the undisbursed funds.<sup>160</sup>

A construction mortgage condominium lender whose mortgage tracks section 711.25 of the Florida Statutes (1971), which restricts the uses to which seller-developers can use a buyer's deposit monies, does not create a fiduciary undertaking by the lender to collect and manage these deposits for the benefit of the buyers. Moreover, even though the lender has the right to inspect the quality of the construction work, this does not render him liable to the buyers if the work is defective.<sup>161</sup>

In a case of apparent first impression in Florida, the District Court of Appeal, Fourth District, held that a mortgagee's *lis pendens* filing in a foreclosure action and the subsequent judicial sale of the property barred any claim by a mechanic's lien claimant, who filed his lien after the *lis pendens* filing and who did not intervene in the mortgage foreclosure action within twenty days as required by the *lis pendens* statute. The mechanics' lien statute provided that when a lien is filed, it relates back to the time of the filing of the notice of commencement,<sup>162</sup> which was filed before the *lis pendens*. In this case, however, there was no lien to relate back to since the lien was unenforceable under the *lis pendens* statute.<sup>163</sup> As a result, the foreclosing mortgagee prevailed.<sup>164</sup>

In another recent case, the District Court of Appeal, First District, found circumstances in which a mechanic's lien holder may impose an equitable lien on undisbursed loan funds in the event of foreclosure by the mortgagee. The contractor holding the mechanic's lien was barred from foreclosure thereof because the mortgagee had earlier filed an action to foreclose the mortgage, accompanied by a notice of *lis pendens*. Although the imposition of an equitable lien in such circumstances normally requires some fraud or misrepresentation by the mortgagee, because the mortgagee had continued to disburse funds pursuant to the construction loan after the mortgagor defaulted and because the lienholder, as a result, did additional work for which it had not been paid, the court did allow

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160. *Blosam Contractors, Inc. v. Republic Mortgage Invs.*, 353 So. 2d 1225 (Fla. 2d DCA 1977).

161. *Armetta v. Clevetrust Realty Invs.*, 359 So. 2d 540 (Fla. 4th DCA 1978).

162. FLA. STAT. § 713.07(2) (1975).

163. *Id.* § 48.23.

164. *Cleveland Trust Co. v. Ousley Sod Co.*, 351 So. 2d 58 (Fla. 4th DCA 1977); *accord*, *Giffin Indus., Inc. v. Southeastern Assocs., Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978).

recovery by the lienholder from the undisbursed funds. This result will not obtain except in situations where the construction is completed, because the mortgagee's unjust enrichment, which justifies the equitable lien, would not be present if the mortgagee foreclosed on an unfinished project. This unjust enrichment arises from the mortgagee's ability to bid on the completed property in the foreclosure sale even though it retained the undisbursed loan proceeds.<sup>165</sup>

In a related case, the Supreme Court of Florida refused to find the mortgagee estopped from asserting the priority of its mortgage without proof by the subsequent lienholders of fraud or misrepresentation by the mortgagee. The loan officer's assurances to subcontractors that there seemed to be enough money left in undisbursed loan funds to pay them and complete the project did not amount to "affirmative deception" equivalent to fraud or misrepresentation necessary to give the subcontractors' liens priority over the previously recorded mortgage.<sup>166</sup> Thus, it appears that an innocent misrepresentation will not be sufficient to support equitable estoppel of the mortgagee. Proof of fraud is required.

After foreclosure proceedings through which a purchaser of construction loans suffered a financial loss, the purchaser may recover damages covering the loss from a third party whose negligence was the cause of the faulty construction necessitating foreclosure. Thus, a purchaser had a cause of action in tort against a professional engineer who signed blank work completion certificates and delivered them to the contractor, which used them to induce the construction lender to make payments for work allegedly performed. The engineer admitted knowing that the payments would be made upon the strength of his certificates. Hence, he was held liable despite a lack of privity between him and the complaining purchaser of the loans.<sup>167</sup>

### J. Attorney's Fees

The general rule is that in the absence of a statute or an express or implied agreement, an attorney is not entitled to a charging lien against his client's realty.<sup>168</sup> As a result, where a mortgagee's attorneys were entitled to fees for foreclosing on the mortgaged property, which the mortgagee subsequently bought at public sale, the attor-

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165. *Giffin Indus., Inc. v. Southeastern Assocs., Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978).

166. *Rinker Materials Corp. v. Palmer First Nat'l Bank*, 361 So. 2d 156, 158 (Fla. 1978).

167. *Barrett, Daffin & Figg, Inc. v. McCormick*, 362 So. 2d 966 (Fla. 1st DCA 1978) (per curiam).

168. *E.g., Billingham v. Thiele*, 109 So. 2d 763 (Fla. 1959).

ney's fees may not constitute a charging lien on the real property. Nevertheless, a court may properly order that the certificate of title be issued to the mortgagee only after proof of payment to the attorneys of the amount due.<sup>169</sup>

## VII. BANKS AND BANKING

### A. Jurisdiction

When a Florida firm negotiates oral contracts with an out-of-state bank and performance is to be made solely out of state, then the Florida firm cannot secure long-arm jurisdiction over the bank under section 48.193(1)(g) of the Florida Statutes (1975) because there were no acts to be performed in this state. Jurisdiction would be proper under section 48.193(1)(a) of the Florida Statutes, however, because the oral transaction caused the foreign bank to engage in a business venture in this state.<sup>170</sup>

### B. Venue

The venue privilege of a national bank established in the National Bank Act allows suits against such institutions only in the federal district in which the bank "may be established" or in any state court in the county or city in which the bank is "located."<sup>171</sup> The Supreme Court of the United States has interpreted this statute to mean that venue is not confined to the county in which the bank's charter was issued. Instead, venue can be laid in any county in which the bank has an authorized branch.<sup>172</sup>

Although the venue provision is mandatory, a national bank may, in appropriate circumstances, be found to have waived the privilege. In *Landmark Bank v. Giroux*,<sup>173</sup> the Supreme Court of Florida found that a waiver of the federal venue privilege did not occur when a bank repossessed the loan collateral, a car, in a county other than the one in which the bank was located. A waiver may be proved, however, by "conduct demonstrating voluntary and inten-

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169. *Overholser v. Walsh & Nottebaum*, 362 So. 2d 471 (Fla. 3d DCA 1978) (per curiam).

170. *Bank of Wessington v. Winters Gov't Sec. Corp.*, 361 So. 2d 757 (Fla. 4th DCA 1978); *Citizens State Bank v. Winters Gov't Sec. Corp.*, 361 So. 2d 760 (Fla. 4th DCA 1978).

171. 12 U.S.C. § 94 (1976), which provides:

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

172. *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977).

173. 358 So. 2d 180 (Fla. 1978).

tional relinquishment or abandonment”<sup>174</sup> of the privilege. The recovery of collateral from a jurisdiction chosen by the debtor is not tantamount to entry for the purpose of doing business. The dissenting justices, on the other hand, believed that a waiver had occurred to the extent of the tortious act, wrongful repossession, which the bank had committed in the foreign jurisdiction. The approach followed by the majority is consistent with that elsewhere adhered to; in the absence of an express waiver, a national bank may be sued only in the district or county in which it is located. Thus, the commission of a tort or the entering into of contracts in a foreign district is not sufficient to support an inference of waiver of the venue privilege.<sup>175</sup> Similarly, the mere fact that a national bank owns real property in Florida does not constitute a waiver of the right to assert that proper venue is in the federal court in the district where the bank is established or in the state court in any county in which the bank is located, in the sense of any county in which it conducts a branch bank.<sup>176</sup> Finally, the venue privilege is not waived when a bank moves to dismiss a complaint on other grounds and subsequently moves for a protective order. Instead, the bank may later file a supplemental motion to dismiss for improper venue.<sup>177</sup>

### C. *Credit Union Share Drafts*

The District Court of Appeal, First District, has held that it is permissible for credit unions to use “share drafts,” which are drafts drawn on the credit union but payable through a commercial bank, as a means of withdrawal, even though these share drafts resemble checks drawn on commercial banks and perform most of the same functions. In disagreeing with the Department of Banking and Finance, the court noted that chapter 657 of the Florida Statutes and the Department’s rules are entirely silent as to the method to be used by credit union members in withdrawing funds from their accounts. The court also recognized that although the Department had not done so, it could by general rule confine commercial banks and credit unions to distinct financial roles and could articulate appropriate practices for credit unions and prohibit others.<sup>178</sup>

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174. *Id.* at 181.

175. *Michigan Nat’l Bank v. Melru Int’l, Ltd.*, 351 So. 2d 1139 (Fla. 3d DCA 1977).

176. *First Pa. Bank v. Oreck*, 357 So. 2d 743 (Fla. 4th DCA 1978).

177. *Beal v. Third Nat’l Bank*, 350 So. 2d 840 (Fla. 1st DCA 1977).

178. *Florida Bankers Ass’n v. Leon County Teachers’ Credit Union*, 359 So. 2d 886 (Fla. 1st DCA 1978).



### D. *Bank Deposits*

The District Court of Appeal, Third District, has held that a depositor may not sue a bank for breach of contract for violating the terms of a deposit agreement when the violation was made at the depositor's request. The agreement provided that all withdrawals would have to be made in the presence of the depositor's trial lawyers because the depositor wanted to prevent her husband from obtaining funds by forging her name. The withdrawals were made at the request of, and were received by, the depositor, although not all were made in the presence of counsel. The Third District allowed the depositor no cause of action. The court distinguished between general deposits, which create a debtor-creditor relationship and may be drawn on in the usual course of the depositor's banking business, and special deposits, which create an agency relationship and do not contemplate a credit on a general account. The court found that this deposit was a general one because the funds were not to be segregated from the other assets of the bank and no specific purpose other than a credit on a general account was contemplated. The depositor had the right to terminate the arrangement at any time and to withdraw from the account. Furthermore, even if the deposit were to be labeled a special account, the depositor would have no action against the bank because she received the funds.<sup>179</sup>

### E. *Set-off*

A depository bank may exercise its rights of set-off against the checking account of its customer, a building contractor, for debts owed by the contractor to the bank, despite the protests of subcontractors who presented checks drawn on this account which were dishonored by the bank. The subcontractors could prevail, however, if they could prove that the bank knew that this account was impressed with a trust for their benefit.<sup>180</sup>

### F. *Governmental Controls*

When a hearing officer has found that applicants for a proposed bank have proved five of the required six criteria for the granting of a charter,<sup>181</sup> and has recommended that the applicants be given an additional fifteen days to file an amended petition regarding the

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179. *Grillo v. City Nat'l Bank*, 354 So. 2d 959 (Fla. 3d DCA 1978) (per curiam).

180. *Northside Bank v. Electrical Enterprises*, 353 So. 2d 927 (Fla. 2d DCA 1978) (per curiam).

181. FLA. STAT. § 659.03(2) (1977).

sixth criterion, it is an abuse of discretion for the comptroller to deny the application without giving the applicants permission to file the amended petition.<sup>182</sup>

In *Carrollwood State Bank v. Lewis*,<sup>183</sup> the District Court of Appeal, First District, indicated that unless a bank can allege the unconstitutionality of a statute, rule or regulation or can show that there is an inadequacy of administrative remedies under the Administrative Procedure Act,<sup>184</sup> a Florida circuit court does not have jurisdiction to entertain an action between the bank and the Department of Banking and Finance. The bank is relegated to administrative hearings and appeals to the district court of appeals as provided by the Act.

Section 626.988 of the Florida Statutes (1977), which forbids any persons employed by a financial institution, including banks, savings and loan associations or holding companies of these institutions, from being insurance agents, applies to employees of production credit associations and federal land bank associations, as these are deemed to be financial institutions.<sup>185</sup>

The District Court of Appeal, First District, recently determined that an assistant vice president of a bank does not come within the terms of section 692.01 of the Florida Statutes (1977), which provides for the execution of instruments conveying, mortgaging or affecting any interest in a corporation's land by a corporation's "president or any vice-president or chief executive officer." Thus, a lease signed by a bank's assistant vice president would be invalid in the absence of proof that the bank had authorized him to execute the lease. Under the statute, a vice president would have presumed authority to execute the lease.<sup>186</sup>

### G. Legislation

Under an amendment to section 665.391 of the Florida Statutes, savings associations may not charge homeowners a penalty

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182. *Public Bank v. Department of Banking & Fin.*, 351 So. 2d 73 (Fla. 1st DCA 1977); *accord*, *McDonald v. Department of Banking & Fin.*, 361 So. 2d 199 (Fla. 1st DCA 1978); *see* *Fraser v. Lewis*, 360 So. 2d 1116 (Fla. 1st DCA 1978) (upholding denial of charter application because order of denial sufficiently explicit about reasons for discretionary act of denial). *See also* *First Nat'l Bank v. Lewis*, 355 So. 2d 869 (Fla. 1st DCA 1978), which upheld the authorization of the establishment of a branch bank, over the protests of a competitor, when the Department of Banking and Finance followed the requirements of the Administrative Procedure Act and advised the bank of the financial risks. The court gave great weight to the Department's decision because of its expertise.

183. 362 So. 2d 110 (Fla. 1st DCA 1978).

184. FLA. STAT. §§ 120.500-.73 (1977).

185. *Production Credit Ass'ns v. Department of Ins.*, 356 So. 2d 31 (Fla. 1st DCA 1978).

186. *Florida First Nat'l Bank v. Dent*, 350 So. 2d 481 (Fla. 1st DCA 1977).

greater than two percent when they prepay home loans of less than \$100,000.<sup>187</sup> In addition, any loans which can be made by a savings association may now provide that the mortgage will cover future advances pursuant to section 697.04 of the Florida Statutes (1977).<sup>188</sup> The same act<sup>189</sup> also changed, among other things, the rules governing the publishing of financial statements<sup>190</sup> and the time and place for directors' meetings.<sup>191</sup>

Additional legislation regarding loan contracts has been enacted in two areas. Industrial savings banks that make loans which exceed thirty-six months in duration may not charge a discount of more than eighteen percent per annum simple interest calculated on the assumption that the loan will be paid in accordance with its agreed terms, regardless of whether the loan may be paid or collected prior to the stated maturity.<sup>192</sup> Furthermore, section 687.03(2)(a) of the Florida Statutes, which deals with usurious loans, has been amended to provide that it and section 687.02 shall not apply to a loan or other advance of credit pursuant to a commitment to guarantee a loan issued by the Veteran's Administration nor a commitment to purchase a loan issued by the Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation or any instrumentality of the Federal government.<sup>193</sup>

Section 659.061(6) of the Florida Statutes was changed to provide that if a trust company establishes a trust service office at the location of a bank that has trust powers, the bank shall retain its trust powers. In addition, a trust company which is establishing a trust service office in a bank that has trust powers may elect in its application with the consent of the bank to become a successor fiduciary. Finally, a trust company which has established a trust service office at a bank that has retained its trust powers may thereafter elect with the consent of the bank to become a successor fiduciary.<sup>194</sup>

The Florida Legislature made changes in two statutes concerning destruction of financial records. Banks and trust companies may now destroy their records, files or copies thereof after ten years. Ledger sheets, however, may not be destroyed unless copies are

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187. FLA. STAT. § 665.391(2) (Supp. 1978).

188. *Id.* § 665.391(5).

189. 1978 Fla. Laws ch. 78-40.

190. FLA. STAT. § 665.121 (Supp. 1978).

191. *Id.* § 665.703(5).

192. *Id.* § 656.17(1).

193. *Id.* § 687.03(2)(a).

194. *Id.* § 659.061(6).

retained. The legislation also defines the various copying processes which may permissibly be used by banks and trust companies.<sup>195</sup> The Department of Banking and Finance may now destroy correspondence files and other records which the Department no longer desires to preserve in accordance with retention schedules and destruction notices established by the Division of Archives, History, and Records Management of the Department of State. These schedules and notices relating to financial records, however, are subject to the approval of the Auditor General.<sup>196</sup> This amendment seems to be a delegation of authority by the legislature to a department of the executive branch, subject to veto by yet another department of the executive branch.

The Florida Legislature made other significant changes in the area of banking. State funds may now be deposited in state savings and loan associations and in federal savings and loan associations.<sup>197</sup> In addition, the Credit Union Guaranty Corporation Act has been extensively amended.<sup>198</sup> Among other things, these changes provide for the powers and duties of the corporation,<sup>199</sup> the effect of payment of claims,<sup>200</sup> and the prevention of insolvencies in credit unions.<sup>201</sup> Furthermore, federal stock associations may now convert into state chartered stock associations and vice versa upon a vote of fifty-one percent or more of the members or stockholders eligible to vote.<sup>202</sup> Finally, the Direct Deposit of Public Funds Act was adopted to permit all public agencies to withdraw, pay or disburse all public funds in their control by direct deposit to the account of the person entitled to receive such funds.<sup>203</sup>

### VIII. CONSUMER PROTECTION

In an action under the Florida Deceptive and Unfair Trade Practices Act,<sup>204</sup> a court may award a money judgment in the event of a violation involving a consumer transaction. A "consumer transaction" is defined as including a sale, lease, or other disposition of goods to an individual relating to a business opportunity which requires the individual to expend money or property and his per-

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195. *Id.* § 658.11(1), (5).

196. *Id.* § 17.27(1).

197. *Id.* § 18.10.

198. 1978 Fla. Laws ch. 78-123.

199. FLA. STAT. § 657.258 (Supp. 1978).

200. *Id.* § 657.261.

201. *Id.* § 657.262(1)-(2).

202. *Id.* § 665.061(1)-(2).

203. 1978 Fla. Laws ch. 78-406, § 2.

204. FLA. STAT. §§ 501.201-.213 (1977).

sonal services in a business "in which he has not been previously engaged."<sup>205</sup> Therefore, an award of monetary damages to individuals who were victims of deceptive practices in the sale of franchises cannot stand in the absence of proof that these victims have not previously been engaged in franchise operations.<sup>206</sup>

The Florida Deceptive Practices and Unfair Trade Practices Act provides for an award of attorney's fees to the prevailing party in litigation involving an alleged violation of a regulation.<sup>207</sup> In *Johnny Crews Ford, Inc. v. Llewellyn*,<sup>208</sup> the District Court of Appeal, Second District, found that fees may be awarded for the successful defense of a counterclaim. A car dealer had sued the buyer for the unpaid portion of the purchase price; the buyer counterclaimed, alleging unfair and deceptive trade practices by the car dealer. The trial court granted a directed verdict against the buyer on the counterclaim.

In *Marshall v. W. & L. Enterprises*,<sup>209</sup> the District Court of Appeal, First District, found that the surety of a bonded mobile home dealer was liable for payment to the consumer, who prevailed against the dealer, of attorney's fees and costs under the Florida Deceptive Practices and Unfair Trade Practices Act.<sup>210</sup> The surety had obligated itself under section 320.77(11) of the Florida Statutes (1975) to pay any loss suffered by the consumer through the wrongful acts of the mobile home dealer. Thus, since the consumer's losses included attorney's fees and costs, the surety was liable for those amounts which became part of the judgment.

In *State v. Barquet*,<sup>211</sup> the District Court of Appeal, Third District, held that the state may not recover damages through a *parens patriae* action against unlicensed abortionists under the Florida Deceptive Practices and Unfair Trade Practices Act. Although the statute<sup>212</sup> allows the state to obtain a declaratory judgment or an injunction, it does not provide for the recovery of damages on behalf of the state.

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205. *Id.* § 501.203(1).

206. *Black v. Department of Legal Affairs*, 353 So. 2d 655 (Fla. 2d DCA 1977) (per curiam).

207. FLA. STAT. § 501.210 (1977).

208. 353 So. 2d 606 (Fla. 2d DCA 1977).

209. 360 So. 2d 1147 (Fla. 1st DCA 1978) (per curiam).

210. FLA. STAT. § 501.210 (1977).

211. 358 So. 2d 230 (Fla. 3d DCA 1978).

212. FLA. STAT. § 501.207 (1977).

### A. *Legislation*

The Consumer Finance Act was amended to provide that no person or licensee shall be deemed in violation of the Act or be subject to any civil or criminal liability for any act or omission made in good faith in reliance upon an order, statement or rule issued by the Department of Banking and Finance. This exemption will apply even if a court should later invalidate the order, statement or rule.<sup>213</sup>

The "odometer tampering" statute, section 319.35 of the Florida Statutes, has been amended to make it a crime to supply a written odometer statement knowing it to be false or to bring into Florida a motor vehicle which has an odometer which has been illegally altered. Motor vehicle dealers must now furnish an odometer disclosure statement to their customers, and motor vehicle inspection stations must now record the odometer reading at each inspection and have it readily available. The penalty for an intentional violation of section 319.35 has been raised from a misdemeanor to a felony of the third degree.<sup>214</sup>

Sections 634.401 through 634.431 were added to the Florida Statutes in an effort to regulate "service warranty associations" which issue service warranties or guaranties designed to indemnify the consumer against the costs of repair or replacement of goods used primarily for personal, family or household purposes. The act delineates the requirements for licensing, funding and reporting of licensees under the act.<sup>215</sup> One may speculate, however, whether all these well-intentioned provisions will result in legislative over-kill of the regulated associations.

The addition of section 371.84 to the Florida Statutes now allows boat marinas which have written leases providing for the sale of owners' boats for unpaid storage fees to sell the boats at a public sale when the rent has not been paid for six months. The legislation provides for detailed steps in this nonjudicial sales process. For example, no boat may be sold for less than fifty percent of its fair market value, which shall be established by the separate appraisals of two licensed property appraisers. Copies of the appraisals shall be deposited with the Department of Natural Resources thirty days prior to the sale. Any sale will be subject to prior perfected liens against the boat. The Department of Natural Resources shall provide certification forms for sales and shall cause the title to the boat to be transferred to the purchaser at a properly conducted sale.

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213. *Id.* § 516.221 (Supp. 1978).

214. *Id.* § 319.35.

215. *Id.* §§ 634.401-.431.

Some of the provisions of this legislation, especially the appraisal concept, could well be adopted in section 9-504 of the UCC as a curb on abuses by repossessing security interest holders.<sup>216</sup>

The Automobile Inspection and Warranty Associations Act was extensively amended to provide detailed requirements for reporting, funding, licensing, premium reserves, record keeping and other matters by such associations which issue automobile warranties.<sup>217</sup> The Act both amends and substantially adds to existing legislation.

Under an amendment to the Motor Vehicles Sales Finance Act, the finance charge limitations on the sale of motor vehicles will not apply to any retail installment contract for the purchase of a mobile home which is titled as a motor vehicle when the finance contract is entered into pursuant to a commitment issued by the Veterans Administration or the Federal Housing Administration.<sup>218</sup>

Persons who enter into contracts with health studios must now cancel their contracts within three days, rather than the former seven days, after acceptance by the mailing or delivery of written notice. The contract must state that if the studio goes out of business and fails to provide substitute facilities within a five mile radius or moves its facilities more than five miles from the location designated in the contract, the customer has a right to cancel the contract. The contract must also provide for cancellation and a refund if the customer dies or becomes totally and permanently disabled during the membership term following the date of the contract. The contract may not exceed thirty-six months, but it may be renewed at the end of each thirty-six month period. The legislation also provides for a \$10,000 bond requirement, or various substitutes, to protect customers.<sup>219</sup>

## IX. SECURITY INTERESTS

### A. *Perfection*

In Florida, a liquor license is a general intangible, and a security interest is perfected in it, as in other general intangibles, by the filing of a financing statement with the Secretary of State of Florida, not with the Division of Beverages, under section 561.65(3) of the Florida Statutes (1977). Section 9-401(2) of the UCC provides that an improper filing is effective against persons having knowledge of the contents of the financing statement. This section, however,

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216. *Id.* § 371.84.

217. 1978 Fla. Laws ch. 78-231.

218. FLA. STAT. § 520.08(5) (Supp. 1978).

219. *Id.* § 501.012.

would not include incorrect filing with the Department of Beverages because this section refers not to a filing which is totally improper, but to a filing in only one place when more is required by the UCC, or to a filing in the wrong place under the UCC. In addition, a trustee in bankruptcy, as the hypothetical ideal lien creditor, is deemed to be without notice of an improperly filed financing statement.<sup>220</sup>

### B. Priorities

The District Court of Appeal, First District, using the illegitimate rationale of *International Harvester Credit Corp. v. American National Bank*,<sup>221</sup> has held that workers who constructed boats for their employer had a lien under section 713.60 of the Florida Statutes (1975), which lien had priority over a bank with a prior perfected security interest in all of the boat company's inventory, raw materials, work in progress and materials to be used or consumed in the business, together with all after acquired property. The security interest of the bank was, therefore, limited to the value of the boat hulls after the satisfaction of the worker's liens.<sup>222</sup> Because *International Harvester* has been legislatively overruled,<sup>223</sup> its equally illegitimate progeny should also be terminated.

In *Barnett Bank v. Rompon*,<sup>224</sup> a bank had a perfected security interest in a mobile home prior to its being affixed to the land. Judgment lien creditors of the mortgagor purchased the mobile home and the underlying land at an execution sale when the bank foreclosed. The District Court of Appeal, Second District, held that although a prior judgment between the mortgagor and the judgment purchasers established that the mobile home was a fixture, this judgment did not bind the bank under an estoppel by judgment theory because it was not in privity with the mortgagors, as its interests arose prior to those of the judgment purchasers. As a result, the bank had the right to litigate its claims that the mobile home was not a fixture and that the bank was not required to comply with the fixture filing rules.

Secured lenders of motor vehicles are concerned about the possibility of encumbered vehicles being forfeited to the state because of their transporting contraband. Risk of loss has been reduced as a

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220. *In re Coed Shop, Inc.*, 435 F. Supp. 472 (N.D. Fla. 1977).

221. 296 So. 2d 32 (Fla. 1974); see notes 268-69 and accompanying text *infra*.

222. *Smith v. Atlantic Boat Builder Co.*, 356 So. 2d 359 (Fla. 1st DCA 1978).

223. See notes 268-69 and accompanying text *infra*.

224. 359 So. 2d 571 (Fla. 2d DCA 1978).



result of the decision in *Griffis v. State*,<sup>225</sup> which held that under sections 943.41 through 943.44 of the Florida Statutes (1975), there cannot be a forfeiture of a vehicle for the transportation of drugs unless there is a proven nexus between the drug found in the vehicle and an illegal drug operation.

In *O'Neill v. Barnett Bank*,<sup>226</sup> the court correctly held that a buyer of an aircraft from a renter of aircraft who does not sell aircraft from inventory cannot be a buyer in the ordinary course of business under section 1-201(9) of the UCC. As a result, he will not cut off a security interest in that aircraft under section 9-307 of the UCC which has been properly perfected under the Federal Aviation Act of 1958.<sup>227</sup> Incorrectly, however, the court went on to say that even if the purchaser were a buyer in the ordinary course of business under the UCC, he would not cut off the perfected security interest because the Federal Aviation Act preempts section 9-307(1) under case law from California<sup>228</sup> and section 329.01 of the Florida Statutes (1975). The California case, however, represents the minority view in the United States, and the federal statute does not control the priority between claimants in this kind of a transaction.<sup>229</sup> If one looks at section 329.01, it is clear that the court totally misread the statute. Although the latter part of this case is dicta, the author fears that this erroneous interpretation may cause trouble in the future.

*Wickes Corp v. General Electric Credit Corp.*<sup>230</sup> involved a question of priority between secured parties holding conflicting interests in inventory and customer installment purchase agreements. Wickes had a perfected security interest in a mobile home dealer's inventory, proceeds of inventory and chattel paper. Mobile homes were sold to consumers in return for "installment security agreements," apparently chattel paper, which the dealer sold to General Electric Credit (GEC). GEC took without knowledge of Wickes' security interest. Some of the mobile homes were returned to the dealer, which would rent them on behalf of these customers. When the dealer defaulted on its loan, Wickes repossessed all of the

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225. 356 So. 2d 297 (Fla. 1978); *accord*, *Nichols v. State*, 356 So. 2d 933 (Fla. 2d DCA 1978); *In re Forfeiture of 1972 Mercury*, 357 So. 2d 472 (Fla. 1st DCA 1978).

226. 360 So. 2d 150 (Fla. 1st DCA 1978).

227. 49 U.S.C. § 1301 (1970).

228. *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P.2d 401, 91 Cal. Rptr. 1 (1971), *cert. denied*, 404 U.S. 823 (1971).

229. *E.g.*, *Haynes v. General Elec. Credit Corp.*, 582 F.2d 869 (4th Cir. 1978); *Sanders v. M.D. Aircraft Sales*, 575 F.2d 1086 (3d Cir. 1978); J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 948 (1972); U.C.C. § 9-104, comment 1.

230. 363 So. 2d 56 (Fla. 3d DCA 1978).

dealer's inventory, including the returned mobile homes. The owners of the homes and GEC brought an action against Wickes for conversion; Wickes claimed the homes as part of inventory. The court held that the returned homes did not become part of the inventory of the dealer and, therefore, were not subject to the security interest in inventory. The court also stated, however, that GEC was a "purchaser for value of the customer installment purchase security agreements. It took possession of the security agreements in the ordinary course of business with no specific knowledge of the security interest of Wickes, and it is entitled to recover the consideration it paid for the security agreements."<sup>231</sup> GEC's security interest was superior to Wickes'. Inasmuch as the facts indicate that Wickes was claiming chattel paper as proceeds of the dealer's inventory financing, however, GEC's lack of knowledge of Wickes' security interest was totally irrelevant under the terms of section 9-308 of the UCC. This careless language may lead to unfortunate results in future cases.

### C. *Proceeds*

In a case of first impression in Florida, the District Court of Appeal, Second District, held that the wording in section 9-306(1) of the UCC that "proceeds includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of," is broad enough to include insurance proceeds received as the result of a theft of the collateral. As a result, the insurance payments came within the terms of the security agreement covering proceeds of collateral. In addition, the prevailing secured creditors were entitled to awards of attorneys' fees, as provided in the security agreements because attorneys were retained for collection. The court reasoned that these fees should have been awarded from the insurance proceeds because the secured parties used the lawyers to establish priority in this fund.<sup>232</sup>

### D. *Usury*

In another case of first impression in Florida, the District Court of Appeal, Third District, held that when a borrower maintains a

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231. *Id.* at 57.

232. *Insurance Management Corp. v. Cable Servs., Inc.*, 359 So. 2d 572, 576 (Fla. 2d DCA 1978). The court admitted that a split of case authority in the United States had developed as to whether the phrase "otherwise disposed of" is broad enough to encompass the involuntary loss by theft, fire, etc. The 1972 version of § 9-306(1) of the UCC does provide that insurance payments are proceeds, "except to the extent that [the insurance policy] is payable to a person other than a party to the security agreement."

minimum loan balance with the lender and the parties then agree to terminate this minimum loan balance in consideration of a large fee which is based upon applying the interest rate of the agreement against this balance for the remainder of the original loan period, it is not to be deemed interest so as to render the loan usurious. Instead, this fee is to be deemed consideration for the termination of a loan and not interest charged for the making of the loan.<sup>233</sup>

### E. Repossession and Foreclosure

The District Court of Appeal, First District, has held that when a security agreement provides that the secured party has on default the right to repossess as stated in section 9-503 of the UCC and there is no express statement as to the secured party's right to come on the debtor's land, then repossession of the collateral, a car, from the debtor's unenclosed carport without threat or use of force is not a trespass. The court stated that "[s]ection 679.503 implies, just as it did at common law, a limited privilege to enter on the debtor's land. The privilege may be exercised only 'without breach of the peace.'"<sup>234</sup>

Whether a so-called "lease" is a lease or, in fact, a security interest in goods, cannot be disposed of by a motion to strike, and if the lease is in fact a security interest the debtor is entitled to notice of sale upon repossession by the creditor. If notice is not given, then the creditor may not recover a deficiency judgment.<sup>235</sup>

In *Wickham v. Famco Services, Inc.*,<sup>236</sup> the trial court refused replevin to a holder of a security agreement who was suing the debtor-owner of a mobile home. Nevertheless, the court ordered the debtor to pay "rent" for use of the trailer and the secured party to reimburse the debtor-owner's down payment as a setoff. The District Court of Appeal, Second District, found the judgment of the trial court totally inconsistent in permitting the debtor-owner to retain possession but making him liable for damages for his rightful possession in causing him to pay rent until he vacated the trailer. In effect, the trial court ordered an implicit rescission of the contract,

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233. *American Wood Prods., Inc. v. Walter Heller & Co. S.E.*, 358 So. 2d 1149 (Fla. 3d DCA 1978).

234. *Marine Midland Bank-Central v. Cote*, 351 So. 2d 750, 752 (Fla. 1st DCA 1977).

235. *Burns v. Equilease Corp.*, 357 So. 2d 786 (Fla. 3d DCA 1978); *Gibraltar Financial & Leasing, Inc. v. Gonzalez*, 353 So. 2d 898 (Fla. 3d DCA 1977). *Gibraltar* also involved a lease which the court implicitly treated as a security interest. The contract provided that the lessor had the right to repossess the rented dental equipment upon a failure by the lessee to pay rent. The lessor could then sell the equipment and recover from the lessee the total of the rents, less the resale price. This agreement was upheld.

236. 350 So. 2d 1159 (Fla. 2d DCA 1977).

which neither party sought. The Second District reversed and remanded for a new trial on the merits.

An unpaid seller of building materials may, in the event that the materials have not been affixed to the land, either peacefully repossess the goods or elect to replevy them under section 713.15 of the Florida Statutes (1977). If the materials have been partly paid for, the repossessing seller must refund this amount before taking possession. In replevin, in contrast, the court will limit the seller's rights to those goods for which payment has not been made.<sup>237</sup> This replevin statute has created a "quasi" security interest which is not found in the ordinary credit sale of goods transaction.

Section 9-504(3) of the UCC, which requires the creditor's sale of the encumbered collateral to be made in a commercially reasonable manner if the creditor seeks a deficiency judgment against the debtor, received an unusual application in *Applestein v. National Bank*.<sup>238</sup> A guaranty of a limited amount of corporate debt was secured by an interest in an aircraft. The State of Florida issued a tax warrant sale. The creditor claimed a deficiency judgment against the corporate owner of the aircraft, which aircraft was then sold at public sale to the creditor, who subsequently sold it at a private sale. The creditor claimed a deficiency judgment against the guarantor. The court held that the tax sale did not constitute a merger and that the creditor would have to show that the sale was conducted in a commercially reasonable manner in order to receive a deficiency award upon summary judgment.

In *Matthews v. Page*,<sup>239</sup> an informally drawn sales agreement provided that the buyer agreed to pay "a minimum of \$400.00 per month until the total amount is paid for." The buyer paid more than this amount for three months and then made no payments for two months. The ambiguously worded agreement might mean that the buyer's excess payments were to be applied to the payments for the succeeding months, and, therefore, the payments might not be in default. As a result, the District Court of Appeal, Fourth District, held it reversible error for the trial court to direct a verdict for the repossessing seller when the buyer sued him in trover.

In *First National Commerce and Finance Co. v. Indiana National Bank*,<sup>240</sup> a case of apparent first impression in Florida, the District Court of Appeal, Third District, held that when a mechanic has a lien which is superior to a prior perfected security interest

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237. *National Steel Prods. Co. v. Myrick*, 353 So. 2d 657 (Fla. 2d DCA 1978).

238. 358 So. 2d 106 (Fla. 3d DCA 1978).

239. 354 So. 2d 458, 459 (Fla. 4th DCA 1978).

240. 360 So. 2d 791 (Fla. 3d DCA 1978).

under section 679.310 of the Florida Statutes (1975) and the mechanic sells the lien goods under section 85.031(2), the purchaser at this sale takes title to the goods subject to the prior perfected security interest unless the holder of this security interest has actual notice of the sale. The court reasoned that it would be a denial of due process to construe the statute as allowing a sale to cut off the interest of the secured party without his having actual notice of the sale. The dissenting judge decried the judicial amendment of the statute. He was of the view that the statute was constitutional as written, but that in the instant case, where the sales price was so grossly out-of-line with the value of the goods, the court should set aside the sale.<sup>241</sup>

In a succinct opinion, the District Court of Appeal, Fourth District, held that plaintiff's security interest in accounts and contract rights did not constitute an assignment of a mechanic's lien and was not sufficient to transfer the right to foreclose an alleged mechanic's lien.<sup>242</sup>

#### F. *Replevin, Garnishment and Attachment*

The Supreme Court of Florida upheld as constitutional the Florida prejudgment replevin statute<sup>243</sup> in *Gazil, Inc. v. Super Foods Services, Inc.*<sup>244</sup> The court held, contrary to three of its prior decisions,<sup>245</sup> that due process requires only that there be an opportunity given to the defendant for a prompt post-seizure hearing, as opposed to a requirement of such a hearing.

Moreover, in *United Presidential Life Insurance Co. v. King*,<sup>246</sup> the supreme court held that in postjudgment garnishment proceedings, there is neither a constitutional requirement that prior notice of garnishment be given to the judgment debtor nor a requirement of any hearing before the writ issues. As a result, the court upheld as constitutional sections 77.01 and 77.03 of the Florida Statutes (1975). Significantly, the supreme court did not decide that prejudgment garnishment was also constitutional under these sections. The case involved the garnishment of a debt owed by an insurance company to its employee, who was the designated agent of the com-

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241. *Id.* at 798.

242. *Hunt Truck Sales & Serv. v. Holopak Village*, 363 So. 2d 27 (Fla. 4th DCA 1978).

243. FLA. STAT. § 78.068 (1977).

244. 356 So. 2d 312 (Fla. 1978).

245. *Ray Lein Constr., Inc. v. Wainwright*, 346 So. 2d 1029 (Fla. 1977); *Phillips v. Guin & Hunt, Inc.*, 344 So. 2d 586 (Fla. 1977); *Unique Caterers, Inc. v. Rudy's Farm Co.*, 338 So. 2d 1067 (Fla. 1977).

246. 361 So. 2d 710 (Fla. 1978).

pany in Florida. The creditor of the employee obtained a writ of garnishment. The Insurance Commissioner sent notice of the writ to the employee because he was the company's Florida agent, but the employee did not notify the insurance company. Thus, the garnishee did not receive actual notice until after a default judgment for the full amount of the debt. The supreme court found that the service of process to the garnishee was sufficient because it was made in accordance with section 624.422 of the Florida Statutes (1975) establishing the designated agent system. The insurance company assumed responsibility for the actions of this agent through its selection of him; thus, the service of process was binding on the corporation even though it was never informed by its employee. In light of the fact that the employer-garnishee defaulted because of failure to receive notice, however, the trial judge abused his discretion in not setting aside the final judgment in that it would be inequitable to enforce the judgment against the employer without allowing it an opportunity to prove that it did not owe money to its employee.<sup>247</sup>

*Country Clubs Ltd. v. Zaun Equipment, Inc.*<sup>248</sup> also involved service of process on a registered agent. The garnishee was a limited partnership. Service of the writ of garnishment was made upon the registered agent for the receipt of process of one of the corporate general partners of the garnishee limited partnership. The court held this to be sufficient service of process on the garnishee although the corporate general partner had assigned its interests to the other general partner, because the limited partnership, through its certificate of organization on file with the Department of State, purported to have the corporation as one of its general partners. Thus, the garnishor acted in reliance and the limited partnership was estopped to deny that the corporation was no longer a partner at the time that the writ of garnishment was served. Under section 48.193(1)(g) of the Florida Statutes (1975), the mere allegation in a garnishor's affidavit that a nonresident foreign corporation had entered into a contract with the principal debtor will not support the exercise of personal jurisdiction over the garnishee. Evidently, however, if the garnishor asserts that its cause of action arose directly from a breach of the contract which was performable in Florida,

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247. See *Hauser v. Dr. Chatelier's Plant Food Co.*, 350 So. 2d 548 (Fla. 2d DCA 1977), wherein the court held that it is reversible error to enter a final judgment against a garnishee after a default judgment has been entered against him without the receiving of evidence of any indebtedness from the garnishee to the judgment debtor.

248. 350 So. 2d 539 (Fla. 1st DCA 1977).

then jurisdiction may be found.<sup>249</sup>

In *Capeletti Brothers, Inc. v. Wild*,<sup>250</sup> the District Court of Appeal, Third District, resolved another jurisdictional issue. A creditor had obtained a judgment against Wild in county court. Wild subsequently obtained a judgment against Capeletti Brothers, Inc., in circuit court. The creditor of Wild, through county court proceedings, then served writs of garnishment on Capeletti Brothers, Inc., which was indebted to Wild as a result of the circuit court decision. Thereafter, the circuit court judge entered an order directing Capeletti Brothers, Inc., to pay Wild the amount of the adjudged debt and dismissing the garnishment actions with prejudice. As a result, the county court refused to take any further action in the garnishment proceedings against Capeletti Brothers, Inc., in that court. The Third District found that the circuit court lacked jurisdiction to discharge garnishment actions in the county court, particularly when the garnishor was not a party in the circuit court action.

In *ITT Community Development Corp. v. Barton*,<sup>251</sup> a case of first impression under Florida law, the United States Court of Appeals for the Fifth Circuit held that a federal district court does not have the power under Florida law, the Federal All Writs Act<sup>252</sup> or the inherent power doctrine<sup>253</sup> to order Florida attorneys who were garnished to pay into the court funds, paid to them by their client as unearned legal fees, in order to secure the payment of a judgment which might later be entered against the attorneys. The court noted that Florida law does not authorize this procedure, which would not come within the inherent power of the court. The All Writs Act would authorize this order only if the complaining party had shown that the turnover procedure had to be employed in order to prevent the attorneys from impeding or defeating the power of the court to conclude the litigation.

Section 222.11 of the Florida Statutes (1977) exempts from garnishment the wages of a head of a family. In *Miami Herald Publishing Co. v. Payne*,<sup>254</sup> the Supreme Court of Florida held that when a writ of garnishment has been served upon an employer and an employee files his affidavit under section 222.12 of the Florida Statutes (1975) claiming that he is the head of a household and that his

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249. *Cosmopolitan Health Spa, Inc. v. Health Indus., Inc.*, 362 So. 2d 367 (Fla. 4th DCA 1978).

250. 363 So. 2d 10 (Fla. 3d DCA 1978) (per curiam).

251. 569 F.2d 1351 (5th Cir. 1978).

252. 28 U.S.C. § 1651 (1970).

253. See 569 F.2d at 1358-61.

254. 358 So. 2d 541 (Fla. 1978).

wages, therefore, cannot be garnished, a contraverting affidavit must be filed within two days. If it is not filed, the garnishment proceeding is terminated as a matter of law, and the court has no continuing jurisdiction over the employer.

The statutory prohibition of garnishment of the wages of a head of a family<sup>255</sup> was interpreted by the District Court of Appeal, Fourth District, in *Killian v. Lawson*.<sup>256</sup> The result was a questionable expansion of the law. The court held that a divorced husband who is paying alimony to his former wife is the head of a family and his wages are exempt from garnishment. The court stressed that the duty of the man to support his ex-wife is the important consideration, not the fact that they were residing apart. The dissent stated that "there can be no head of a family when there is no family."<sup>257</sup>

In *Miami National Bank v. Barnett Bank*,<sup>258</sup> the District Court of Appeal, Third District, reversed a default judgment and an order denying a motion to set aside the judgment. The court determined that proof filed one day late by a garnishee bank that it had terminated the employment of an officer in charge of review of writs of garnishment and had assigned his tasks to another employee, which delayed its answering the garnishment, was a meritorious defense under the rules showing excusable neglect sufficient to set aside a default judgment.<sup>259</sup>

In *Florida National Bank v. Rosen*,<sup>260</sup> the District Court of Appeal, Third District, held that a garnishee bank was entitled to costs and reasonable attorney's fees when the garnishor sought to garnish funds to satisfy a judgment debt owed by a depositor of the bank. It was reversible error for the trial court to award ten dollars for both of these expenses incurred by the bank through the garnishment.

### G. Attachment and Garnishment Legislation

Several of the Florida statutes dealing with attachment were amended. The writ of attachment must now be issued by a judge.<sup>261</sup> The writ may issue when the justifying grounds clearly appear in a verified complaint or in a separate affidavit of the plaintiff.<sup>262</sup> After execution of the writ of attachment, the property must be returned

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255. FLA. STAT. § 222.11 (1977).

256. 362 So. 2d 1007 (Fla. 4th DCA 1978).

257. *Id.* at 1008 (Moore, J., dissenting).

258. 350 So. 2d 523 (Fla. 3d DCA 1977).

259. FLA. R. CIV. P. 1.500(d) & 1.540(d).

260. 353 So. 2d 1280 (Fla. 3d DCA 1978).

261. FLA. STAT. § 76.03 (Supp. 1978).

262. *Id.* § 76.08.



to the defendant upon the posting of a bond in an amount which shall exceed by one-fourth the value of the property or exceed by one-fourth the value of the claim, whichever is less.<sup>263</sup> Finally, the defendant is entitled to an immediate hearing upon his motion for a dissolution of the attachment. This motion shall be granted unless the plaintiff proves the grounds upon which the attachment writ was issued and proves a reasonable probability that he will receive a favorable final judgment.<sup>264</sup> In addition, employers may now be garnished to enforce an award against an employee for alimony or child support or both. The salary of this employee may be garnished on a periodic and continuing basis until further order of the court.<sup>265</sup>

#### H. Miscellaneous

In *Flagship State Bank v. Carantzas*,<sup>266</sup> a lien creditor delivered his writ of execution to the sheriff, who did not execute the writ. Two years later, a second lien creditor delivered his writ against the same debtor. The sheriff levied this writ and conducted a sale under the advertised notice that the sale would be to the highest cash bidder. The notice was explicit that the sale was subject to the rights of the first execution creditor. The court held that the second lien creditor could not bid in a portion of his claim instead of paying fully in cash. In addition, the purchasing second lien creditor took title subject to the first execution lienholder's rights, since he took with notice of these rights.

In Florida, a debtor sending a check to his creditor has the right to designate that the proceeds of the check shall be used to pay a particular debt, and if the amount of the check exceeds this debt, the creditor may not apply the excess amount to another alleged debt owed by the debtor but which is contested by the debtor. If the creditor should refuse to return the excess amount upon demand, this constitutes a conversion of the funds.<sup>267</sup>

#### I. Legislation

The rationally inexplicable 1974 case of *International Harvester Credit Corp. v. American National Bank*<sup>268</sup> has been legislatively overruled.<sup>269</sup> The Supreme Court of Florida in *International*

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263. *Id.* § 76.18.

264. *Id.* § 76.24(1).

265. *Id.* § 61.12(2).

266. 352 So. 2d 1259 (Fla. 1st DCA 1978).

267. *All Cargo Transp., Inc. v. Florida E.Coast Ry.*, 355 So. 2d 178 (Fla. 3d DCA 1978).

268. 296 So. 2d 32 (Fla. 1974).

269. FLA. STAT. § 679.312(3)-(4) (Supp. 1978).

*Harvester* had held that when a purchase money but unperfected security interest holder was competing with a prior perfected security interest holder who claimed an interest in after-acquired property of the debtor, the prior creditor had a claim only to the debtor's equity in the after-acquired property. Now, as originally stated in section 9-312 of the UCC, if the purchase money security interest holder does not perfect by the filing of a financing statement within ten days, the holder of a perfected security interest in after-acquired property of the debtor takes priority over the unperfected purchase money lender in all of the collateral, not just in the borrower's equity.

### J. *The Bankruptcy Reform Act of 1978*

The "preference" section of the new Bankruptcy Reform Act of 1978<sup>270</sup> will seriously curtail the free-wheeling floating lien provisions<sup>271</sup> of the UCC in the event of bankruptcy. Under the new Act, a financier of security interests in inventory and accounts (and proceeds of either) whose amount of the debt exceeds the value of the collateral at a point ninety days before bankruptcy and who has received transfers during said period which reduced the amount of the debt to the prejudice of unsecured creditors would have to disgorge these transfers to the trustee as a voidable preference.<sup>272</sup> If the financier is an "insider,"<sup>273</sup> for instance, a relative, general partner, or officer, director or controlling party of a corporation, the preference period has been extended to one year prior to the filing of the bankruptcy petition.<sup>274</sup> In the noninsider preference cases, it will no longer be necessary to allege and prove that the debtor was insolvent when the voidable preference transfer was made.<sup>275</sup> In insider preference cases, it will still be necessary for the trustee to allege and prove that the insider had reasonable cause to believe that the debtor was insolvent at the time of such transfer in order to recapture preferences made during the extended one-year period.<sup>276</sup>

For purposes of the voidable preference, the debtor will be presumed to have been insolvent for the ninety days immediately pre-

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270. Pub. L. No. 95-598, 92 Stat. 2549.

271. U.C.C. §§ 9-204, -302, -402. The floating lien created by the UCC has been judicially protected. *E.g.* *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1969); *Grain Merchants, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir. 1969).

272. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 547(C)(5), 92 Stat. 2599.

273. *Id.* § 101(25).

274. *Id.* § 547(B)(4), (C)(5).

275. *Id.*

276. *Id.*

ceding the date of the filing of the petition. This presumption appears to refer to the burden of coming forward with the evidence rather than the burden of persuasion.<sup>277</sup> Also, the former four-month rule for voidable preferences has been reduced to ninety days prior to the filing of the bankruptcy petition.<sup>278</sup> The old twenty-one day grace period for the perfection of transfers has now been reduced to ten days,<sup>279</sup> and it appears that the twenty-one day grace period rule in section 9-304 of the UCC will also have to be eliminated.

In addition, the preference section seems to have freed from the taint of preference payments of debts by the bankrupt made within forty-five days of the incurrance of the debts in the ordinary course of business of both the debtor and the transferee-creditor.<sup>280</sup> Space and subject matter limitations, however, do not permit a complete review of this extensive act.

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277. *Id.* § 547(F).

278. *Id.* § 547.

279. *Id.* § 547(c)(3)(B), (e)(2)(A)-(C).

280. *Id.* § 547 (c)(2).